Supreme Court, U.S.
FILED

091378 MAY 12 2010

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

EDDIE MENDIOLA,

Petitioner,

v.

ERIC H. HOLDER,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

SCOTT L. SHUCHART
Yale Law School Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

KARI E. HONG
Law Offices of Kari E. Hong
1300 Clay, Ste. 600
Oakland, CA 94612
(510) 384-4524

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) provided aliens an express statutory right to file a motion to reconsider a determination of removability, 8 U.S.C. § 1229a(c)(6)(A), and to reopen removal proceedings, 8 U.S.C. § 1229a(c)(7)(A). The statute imposes limits on the number and timing of such motions, but does not condition the right to file on an alien's geographic location. When the Attorney General promulgated implementing regulations for IIRIRA, however, she retained, without amendment, a pre-IIRIRA regulation barring aliens from filing such motions after the alien has been removed from or has voluntarily departed the United States. The question presented is:

Whether this regulation, 8 C.F.R. § 1003.2(d), is invalid under IIRIRA because it denies aliens who have been removed from or who otherwise have departed the United States their statutory right to file a motion to reopen or reconsider an order of removability.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY AND REGULATORY PROVISIONS INVOLVED 1
STATEMENT 2
A. Statutory and Regulatory Background 3
B. Removal Proceedings 7
C. Motions to Reopen and Reconsider 10
1. First Motion to Reopen 10
2. Second Motion to Reopen 12
D. Tenth Circuit Decision 13
REASONS FOR GRANTING THE PETITION 14
I. The Courts Of Appeal Are Divided Over The Validity of 8 C.F.R. § 1003.2(d). 15
II. The Issue Presented Here Is A Recurring One Of Substantial Practical Importance 20
A. The Practical Importance Of Motions To Reopen and Reconsider Counsels In Favor Of Review. 21
B. Court of Appeals Confusion Over *Dada* v. *Mukasey* Requires Resolution By This Court. 25
III. The Tenth Circuit's Decision Is Wrong. 26
CONCLUSION 32

TABLE OF CONTENTS—continued

Page

APPENDICES

A. Opinion and Order, *Mendiola* v. *Holder*, No. 08-965, 585 F.3d 1303 (10th Cir. Oct. 28, 2009) 1a

B. Order, *In re Eddie Mendiola* (BIA Oct. 8, 2008) (*per curiam*) 16a

C. Order Denying Rehearing, *Mendiola* v. *Holder*, No. 08-965 (10th Cir. Dec. 30, 2009) 18a

TABLE OF AUTHORITIES

Page(s)

CASES

Ablahad v. *Gonzales*,
217 F. App'x 470 (6th Cir. 2007) 18

Ahmad v. *Gonzales*,
204 F. App'x 98 (2d Cir. 2006) 19

Al-Mousa v. *Holder*, No. 07-61003,
2010 WL 1141567
(5th Cir. Mar. 17, 2010) 18

Aris v. *Mukasey*,
517 F.3d 595 (2d Cir. 2008) 23, 24, 25

Azarte v. *Ashcroft*,
394 F.3d 1278 (9th Cir. 2005) 27

Benslimane v. *Gonzales*,
430 F.3d 828 (7th Cir. 2005) 23

Castillo-Perales v. *Mukasey*,
298 F. App'x 366 (5th Cir. 2008) 18

Chevron, U.S.A., Inc. v.
Natural Resources
Defense Council, Inc.,
467 U.S. 837 (1984) 27

Clay v. *United States*,
537 U.S. 522 (2003) 28

Coyt v. *Holder*,
593 F.3d 902 (9th Cir. 2010) 17

Dada v. *Mukasey*,
128 S. Ct. 2307 (2008) ..... *passim*

Dodd v. *United States*,
545 U.S. 353 (2005) 27

TABLE OF AUTHORITIES—continued

Page(s)

Grewal v. *Attorney General of the United States*, 251 F. App'x 114 (3d Cir. 2007) 19
I.N.S. v. *St. Cyr*, 533 U.S. 289 (2001) 22
Jalloh v. *Gonzales*, 181 F. App'x 131 (2d Cir. 2006) 19
Kucana v. *Holder*, 130 S. Ct. 827 (2010) 20
Lin v. *Gonzales*, 473 F.3d 979 (9th Cir. 2007) 20
Lopez v. *Gonzales*, 549 U.S. 47 (2006) 8, 10
Matter of Lozada, 19 I. & N. Dec. 637 (BIA 1988) 12
Mai v. *Gonzales*, 473 F.3d 162 (5th Cir. 2006) 24
Mansour v. *Gonzales*, 470 F.3d 1194 (6th Cir. 2006) 18-19
Marsan v. *Attorney General of the United States*, 199 F. App'x 159 (3d Cir. 2006) 19
Mendiola v. *Gonzales*, 189 F. App'x 810 (10th Cir. 2006) 10
Mendiola v. *Mukasey*, 280 F. App'x 719 (10th Cir. 2008) 12
Munoz De Real v. *Holder*, 595 F.3d 747 (7th Cir. 2010) 17
Navarro-Miranda v. *Ashcroft*, 330 F.3d 672 (5th Cir. 2003) 18
Nken v. *Holder*, 129 S. Ct. 1249 (2009) 5, 31
Oladokun v. *Attorney General of the United States*, 207 F. App'x 254 (3d Cir. 2006) 19

TABLE OF AUTHORITIES—continued

Page(s)

Ovalles v. *Holder*,
577 F.3d 288 (5th Cir. 2009) 18
Pena-Muriel v. *Gonzales*,
489 F.3d 438 (1st Cir. 2007) 19
Riley v. *I.N.S.*, 310 F.3d 1253 (10th Cir. 2002) 13
Rosillo-Puga v. *Holder*,
580 F.3d 1147 (10th Cir. 2009) ..... *passim*
Ruiz-Vidal v. *Gonzales*,
473 F.3d 1072 (9th Cir. 2007) 9
In re S-M-J-, 21 I. & N. Dec. 722 (BIA 1997) 31
Sankar v. *United States Attorney General*,
284 F. App'x 798 (11th Cir. 2008) 19
Silerio-Nunez v. *Holder*,
356 F. App'x 151 (10th Cir. 2009) 16, 17
Singh v. *Ashcroft*,
367 F.3d 1182 (9th Cir. 2004) 24
Tahiraj-Dauti v. *Attorney General of the United States*,
323 F. App'x 138 (3d Cir. 2009) 19
United States v. *Johnson*,
529 U.S. 53 (2000) 29
Uritsky v. *Holder*,
327 F. App'x 605 (6th Cir. 2009) 19
Wang v. *Attorney General of the United States*,
423 F.3d 260 (3d Cir. 2005) 23
William v. *Gonzales*,
499 F.3d 329 (4th Cir. 2007) 15, 16, 27

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES, RULES AND REGULATIONS

8 U.S.C. § 1105a (1964) 5
8 U.S.C. § 1105a (1994) 5, 31
8 U.S.C.
§ 1101 ..... 4, 8
§ 1227 8
§ 1229a ..... *passim*
§ 1252 4
18 U.S.C. § 924 8
Controlled Substances Act, 21 U.S.C. § 801 *et seq.* 8
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ..... 1, 6
8 C.F.R.
§ 1003.2 ..... *passim*
§ 1003.23 ..... 4, 7
21 C.F.R. § 1300.01 9
Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002) 22-23
Executive Office for Immigration Review, Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999) 22
Immigration and Naturalization Service, Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502 (Sept. 4, 1940) 4-5

TABLE OF AUTHORITIES—continued

Page(s)

Immigration and Naturalization Service, Miscellaneous Amendments to Chapter, 23 Federal Register 9115 (Nov. 26, 1958) 5

California Health & Safety Code § 11056 (West 2007) 9

MISCELLANEOUS

Administrative Office of the U.S. Courts, 2009 Annual Report of the Director: Judicial Business of the U.S. Courts (2009) 21

Maria Baldini-Potermin, *It's Time to Reconsider Automatic Stays of Removal: Petitions for Review, Motions to Reopen, BIA Regulations, and the Race to the Courthouse*, 10-01 Immigr. Briefings 1 (2010) 24

Board of Immigration Appeals Practice Manual, *available at* http://www.usdoj.gov/eoir 4

LaJuana Davis, *Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings*, 58 Drake L. Rev. 123 (2009) 23

Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 Geo. Immigr. L.J. 595 (2009) 23

H.R. Rep. No. 104-469 (1996) 29

Members' Forum on Immigration: Hearing Before the Subcommittee on Immigration and Claims of the House Committee on the Judiciary, 104th Cong. (1995) 29

TABLE OF AUTHORITIES—continued

Page(s)

Office of Immigration Statistics, U.S. Department of Homeland Security, Yearbook of Immigration Statistics: 2008 (2009) 22

Office of Planning, Analysis & Technology, Executive Office for Immigration Review, FY 2009 Statistical Yearbook (2009) 24

John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 Geo. Immigr. L.J. 1 (2005) 22

Diana R. Podgorny, *Rethinking the Increased Focus on Penal Measures in Immigration Law as Reflected in the Expansion of the "Aggravated Felony" Concept*, 99 J. Crim. L. & Criminology 287 (2009) 21

Proposals for Immigration Reform: Hearing Before the Subcommittee on Immigration and Refugee Affairs of the Senate Committee on the Judiciary, 103d Cong. (1994) 29-30

Jaya Ramji-Nogales et al., *Refuge Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007) 23

Removal of Criminal and Illegal Aliens: Hearing Before the Subcommittee on Immigration and Claims of the House Committee on the Judiciary, 104th Cong. (1995) 29

Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 Yale J. on Reg. 47 (2010) 21

PETITION FOR A WRIT OF CERTIORARI

Petitioner Eddie Mendiola respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App., *infra*, 1a-15a) is reported at 585 F.3d 1303. The court of appeals' order denying rehearing and rehearing en banc (App., *infra*, 18a) is unpublished.

The order of the Board of Immigration Appeals denying petitioner's motion to reopen (App., *infra*, 16a-17a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2009. A timely petition for rehearing was denied on December 30, 2009. On March 23, 2010, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to May 28, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title 8, U.S. Code § 1229a(c), originally enacted as section 240(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009, provides in relevant part:

(c) Decision and burden of proof

* * * * *

(6) Motions to reconsider

> **(A) In general**
>
> The alien may file one motion to reconsider a decision that the alien is removable from the United States.
>
> * * * * *
>
> **(7) Motions to reopen**
>
> **(A) In general**
>
> An alien may file one motion to reopen proceedings under this section * * *.

Title 8, Code of Federal Regulations § 1003.2 provides in relevant part:

> (d) *Departure, deportation, or removal.* A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

STATEMENT

Congress has provided that an alien who is ordered removed from the United States may file a motion to reconsider the order of removal or to reopen the removal proceedings, so that the alien may present new evidence or seek relief from error. In this case, however, the Tenth Circuit held that such relief is unavailable to aliens once they have de-

parted the United States. This issue has been widely litigated and has divided the courts of appeals: The Tenth Circuit here expressly rejected the contrary view of the Fourth Circuit, which has held that Congress expressly guaranteed aliens the right to seek removal or reconsideration no matter what their location. Seven other courts of appeals also have taken conflicting approaches to the question.

This is an issue of substantial practical importance. Summary administrative processes or—as in this case—the ineffective assistance of counsel during removal proceedings lead with some frequency to errors in the determination of removability; here, manifest errors by petitioner's counsel led the Board of Immigration Appeals ("BIA" or "Board") to overlook two considerations that should have precluded petitioner's removal. Motions to reconsider or reopen are an "important safeguard" against errors of this sort. *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2318 (2008). By holding that many aliens may not even request such relief, the Tenth Circuit departed from the governing statutory language, frustrated the congressional purpose, and embraced a rule that leaves no recourse for the demonstrably erroneous exclusion of persons from the United States. Further review, to bring uniformity to the courts of appeals and eliminate a significant distortion of the immigration law, accordingly is warranted.

A. Statutory and Regulatory Background

1. The government initiates removal proceedings against a noncitizen by filing a Notice to Appear with an Immigration Judge ("IJ"), specifying the grounds alleged for removal. 8 U.S.C. § 1229(a)(1). Aliens determined to be removable by the IJ may appeal their removal order to the BIA. The removal order be-

comes final upon review by the BIA (or upon expiration of the filing deadline for BIA review). *Id.* § 1101(a)(47)(B). At that point, the alien may seek judicial review of the removal order by filing a petition for review in the court of appeals for the circuit in which the removal hearing was conducted. *Id.* § 1252(a)(5).

An alien also may seek administrative review of an IJ's removal decision or of a final removal order by filing a motion to reopen or reconsider.[1] *Id.* § 1229a(c)(6)-(7). Motions to reopen give aliens a chance to challenge their removal by presenting new, material facts that were unavailable at their original removal proceedings. 8 C.F.R. §§ 1003.2(c)(1), 1003.23(b)(3). See *Dada*, 128 S. Ct. at 2315, 2318. Motions to reconsider allow an alien to challenge mistakes of fact or law in the original administrative decision. *Id.* §§ 1003.2(b)(1), 1003.23(b)(2).[2]

---

[1] Such motions are filed directly with the IJ where the BIA never took jurisdiction over the alien's case—for example, where an alien failed to appeal the removal order. Otherwise, they are properly filed with the BIA. See BIA Practice Manual app. K ("Where to File a Motion"), *available at* http://www.usdoj.gov/eoir. Motions may be filed with the BIA while the alien's appeal is pending, but may be treated as a motion to remand to the IJ or consolidated with the appeal to the Board. 8 C.F.R. §§ 1003.2(b)(1), 1003.2(c)(4).

[2] The regulations governing motions to reopen and reconsider were originally codified at 8 C.F.R. § 3.2. The regulations were recodified in 2003 pursuant to the Homeland Security Act of 2002, as amended, which transferred the functions of the former Immigration and Naturalization Service to the Department of Homeland Security, while retaining the Executive Office of Immigration Review in the Department of Justice. 68 Fed. Reg. 9824 (Feb. 28, 2003).

The BIA has had the authority to entertain such motions since its creation. See Immigration and Naturalization Service, Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502, 3504 (Sept. 4, 1940) (codified at 8 C.F.R. § 90.9) (creating the BIA and providing that "[t]he reconsideration, reargument or reopening of a final decision by the Board of Immigration Appeals shall be permitted only upon motion."); see also *Dada*, 128 S. Ct. at 2315; Immigration and Naturalization Service, Miscellaneous Amendments to Chapter, 23 Fed. Reg. 9115, 9118 (1958) (final rule codified at 8 CFR § 3.2 (1959)) (allowing the BIA to "reopen or reconsider any case in which it has rendered a decision" on its own motion or by written motion of a party). Until 1996, however, motions to reopen and reconsider removal orders were solely creatures of regulation. And of particular importance here, the governing regulations prevented the Board or an IJ from considering motions to reopen or reconsider filed by "by or in behalf of a person who is the subject of deportation proceedings *subsequent to his departure from the United States*." *Ibid.* (emphasis added). This regulatory post-departure bar mirrored the then-governing statutory limit on judicial review, which provided that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien * * * has departed from the United States after issuance of the order." 8 U.S.C. § 1105a(c) (1964). Until the repeal of this post-departure bar to federal court review in 1996, most aliens received an automatic stay of their removal order pending resolution of any appeal to prevent the court from being divested of jurisdiction by the alien's departure from the United States. See § 1105a(a)(3) (1994); *Nken* v. *Holder*, 129 S. Ct. 1249, 1755 (2009) (explaining pre-IIRIRA regime).

2. What began as a regulatory privilege became a statutory right with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009. Among its many reforms, IIRIRA repealed the statutory prohibition on judicial review of removal orders when an alien has departed the country. IIRIRA § 306(b), 110 Stat. 3009-612 (repealing former 8 U.S.C. § 1105a). IIRIRA also, for the first time, expressly provided aliens a specific statutory right to file one motion to reconsider and one motion to reopen an order of deportation within 90 days of the entry of the final administrative order of removal. 8 U.S.C. § 1229a(c)(6)(A) ("The alien may file one motion to reconsider a decision that the alien is removable from the United States."); *id.* § 1229a(c)(7)(A) ("An alien may file one motion to reopen proceedings * * *."). The new statute does *not* include a post-departure bar on the now statutorily-authorized motions to reopen or reconsider deportation proceedings before the BIA (or an IJ).

When the Attorney General promulgated implementing regulations for IIRIRA in March 1997, however, she retained without change the pre-IIRIRA bar on post-departure motions to reopen and to reconsider. The current regulation, 8 C.F.R. § 1003.2(d), which is substantially identical to the one in force before the enactment of IIRIRA, prohibits the BIA from considering motions to reopen removal proceedings filed by any alien who has departed the United States, either voluntarily or involuntarily. It reads:

> A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation,

> or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

Ibid. A second regulation, 8 C.F.R. § 1003.23(b)(1), contains virtually identical language governing motions to reopen or reconsider filed before IJs.[3]

B. Removal Proceedings

Petitioner, a native and citizen of Peru, moved to the United States at age two and became a lawful permanent resident in 1989. A.R. 55.

In 1996, petitioner pleaded guilty to misdemeanor possession of steroids, in violation of section 11377 of the California Health and Safety Code. A.R. 550, 553. Four years later, he was charged with felony possession of steroids as a repeat offender. A.R. 544-545. As the California courts subsequently recognized, this conviction was flawed because the

---

[3] 8 C.F.R. § 1003.23(b)(1) provides, in relevant part:

> (b) *Before the Immigration Court*—
>
> (1) *In general.* * * * A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.

prosecution did not charge or establish (and petitioner did not admit to) the fact of the prior conviction. But petitioner, due to the ineffective assistance of his attorney, pleaded guilty to the felony charge. A.R. 541. The erroneous felony conviction remained on petitioner's record for eight years.

On March 29, 2004, the Government initiated removal proceedings against petitioner, based in relevant part on his two state convictions for steroid possession. A.R. 622-625. The government charged that petitioner had committed a drug trafficking crime as defined by 18 U.S.C. § 924(c).[4] Specifically, the government alleged that petitioner had possessed anabolic steroids in violation of the Controlled Substances Act (CSA), and that he was therefore removable as an aggravated felon under 8 U.S.C. § 1227(a)(2)(A)(iii). A.R. 624; see 8 U.S.C. § 1101(a)(43)(B) (defining "aggravated felony" as, *inter alia*, a drug trafficking crime as defined in 18 U.S.C. § 924(c)). But this argument, too, was flawed; although the government submitted the indictments, pleas, judgment, and sentencing documents from the two California possession convictions for the immigration court's consideration[5] (A.R. 535-556), none of those documents proved that petitioner in fact pos-

---

[4] A drug trafficking crime is, *inter alia*, any conduct "punishable as a felony" under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*). *Lopez* v. *Gonzales*, 549 U.S. 47, 60 (2006); see 18 U.S.C. § 924(c)(2). While first-time possession is punished only as a misdemeanor under the CSA, recidivist possession is punished as a felony. 21 U.S.C. § 844(a).

[5] In removal proceedings, the government has the burden of establishing removability by clear and convincing evidence. 8 U.S.C. § 1229a(c)(3)(A). To prove removability, the government is limited to the conviction record. *Id.* §1229a(c)(3)(B).

sessed anabolic steroids *proscribed by the Controlled Substances Act.* Petitioner had in fact been charged with simple "steroid" possession, and California punishes possession of a far wider range of steroids than does the CSA. Compare Cal. Health & Safety Code § 11056(f) (West 2007), with 21 C.F.R. 1300.01(b)(4) (2009); see also *Ruiz-Vidal* v. *Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007) (noting that "California law regulates the possession and sale of numerous substances that are not similarly regulated by the CSA" and concluding that, as a result, "the simple fact of a conviction under Cal. Health & Safety Code § 11377 is insufficient [to establish a federal drug trafficking conviction]"). Petitioner's counsel at the time, however, failed intelligibly to raise this defense to removability.[6]

On July 14, 2004, the IJ concluded that petitioner was removable as an aggravated felon and ordered him removed to Peru. A.R. 513. The IJ relied on the fact that "anabolic steroids" are on both the federal and California controlled substance schedules, even though petitioner was never charged with possessing anabolic steroids. A.R. 516-517.

Petitioner appealed to the BIA, which affirmed the IJ's decision in reliance both on the incorrect belief that petitioner's steroid possession violated fed-

---

[6] Counsel did refer briefly to the distinction between state and federal law, although he garbled the explanation: "[T]here is no connection between the California statutes regarding the possession of steroids and a federal analog in the federal schedules of controlled substances, since 'steroids' are not contained therein." A.R. 595; see also A.R. 530. Inexplicably, however, counsel abandoned this argument on appeal to the BIA and Tenth Circuit and in petitioner's first motion to reopen (on which the same attorney was counsel).

eral law and on petitioner's defective felony conviction, stating that, in the Tenth Circuit, "a state drug offense qualifies as a drug trafficking aggravated felony *if it is punishable under federal narcotics law* and *classified as a felony in the convicting jurisdiction*." A.R. 463 (emphasis added). The Tenth Circuit, also relying on the mistaken felony conviction, denied petitioner's subsequent petition for review. *Mendiola* v. *Gonzales*, 189 F. App'x 810 (10th Cir. 2006). In March 2005, while his petition for review was pending before the court of appeals, petitioner was removed from the United States.

C. Motions to Reopen and Reconsider

Petitioner returned to the United States in the summer of 2005 and was subsequently charged with reentering after removal for an aggravated felony, in violation of 8 U.S.C. § 1326. A.R. 123-125. The information, however, was later dismissed without prejudice on the government's motion. A.R. 294.

1. First Motion to Reopen

On May 14, 2007, while in custody, petitioner filed a motion to reopen (through the same attorney who had represented him in his removal proceedings), requesting that the BIA reconsider its decision in light of this Court's decision in *Lopez* v. *Gonzales*, 549 U.S. 47 (2006).[7] A.R. 448-454. The BIA denied the motion for lack of jurisdiction under 8 C.F.R.

[7] The motion to reopen was twice rejected for jurisdictional and procedural errors committed by petitioner's counsel. Counsel originally filed with the Immigration Court, though jurisdiction rested solely with the BIA. A.R. 374. When subsequently filed with the proper body, the motion was again rejected for being filed on the wrong form and not including a certificate of service. A.R. 372. These errors were later corrected.

§ 1003.2(d), the regulation prohibiting motions to reopen before the BIA following departure from the United States. A.R. 438-439. The BIA also noted that the motion was untimely because it had been filed more than 90 days after entry of the final order of removal (A.R. 438), and that the Board was precluded by §1003.2(d)'s post-departure bar from exercising its authority to *sua sponte* reopen or reconsider a decision that does not meet the time or numerical limit.[8] A.R. 439.

On August 28, 2007, the California Superior Court entered an order correcting petitioner's conviction record, re-classifying his 2000 steroid possession conviction as a misdemeanor. A.R. 84. Though aware that the motion to correct the record was pending in California Superior Court, petitioner's immigration attorney failed to properly present this information to the BIA and was therefore barred from presenting the corrected criminal record on petition for review to the Tenth Circuit. A.R. 135.

Petitioner's counsel filed a petition for review with the Tenth Circuit,[9] but failed to dispute the BIA's conclusion that the post-departure bar in

---

[8] Pursuant to 8 C.F.R. § 1003.2(a), the BIA "may at any time reopen or reconsider on its own motion any case in which it has rendered a decision." Under this discretionary power, the BIA may entertain motions that do not meet the time or numerical limits.

[9] Petitioner's opening brief was originally rejected due to multiple, basic procedural defects, including failure to attach the BIA order being appealed and failure to submit the necessary motion for permission to file. His reply brief was similarly flawed; the original filing had the wrong case number, was oversized, and was missing the necessary motion to file out of time. These errors were later corrected. A.R. 153.

§ 1003.2(d) controlled the disposition of his motion. The Tenth Circuit denied petitioner's petition for review. *Mendiola* v. *Mukasey*, 280 F. App'x 719, 722 (10th Cir. 2008).

Petitioner's counsel promised to petition this Court for review of the Tenth Circuit's decision, taking $1,000 in advance payment. A.R. 144. But counsel subsequently advised petitioner to find another lawyer "who could do a better job"; two weeks before the petition was to be filed, in July 2008, the attorney acknowledged that he was not a member of this Court's bar. A.R. 135. Petitioner, previously unaware of his attorney's numerous and prejudicial mistakes, immediately began to search for new representation, retaining new counsel on July 27, 2008. A.R. 134.

2. Second Motion to Reopen

On September 11, 2008, less than two months after retaining new counsel, petitioner filed a motion to reopen and reconsider with the BIA, arguing that extraordinary circumstances—his corrected conviction history—rendered his removal order invalid. Mot. Reopen & Reconsider 12-16, *In re Mendiola*, No. A 092-099-498 (BIA Sept. 11, 2008). Petitioner also argued that, but for the ineffective assistance of his prior counsel, he would have prevailed at his immigration hearing and in his original motion to reopen, and that the ineffective assistance of his former counsel should toll the time and numerical limits for motions to reopen. *Id.* at 17-27.[10]

---

[10] In compliance with *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (BIA 1988), which sets forth the grounds for reopening a removal case for ineffective assistance of counsel, petitioner's new counsel filed a bar complaint against petitioner's previous attorney with the Colorado Supreme Court. A.R. 129. Petitioner's

The Board rejected petitioner's claim, holding that the post-departure bar in 8 C.F.R. § 1003.2(d) both prohibited him from filing a motion to reopen and denied the BIA the authority to reopen petitioner's proceedings *sua sponte*. A.R. 2. The BIA also denied the new motion on the grounds that it was untimely and barred as an impermissibly successive petition under 8 C.F.R. § 1003.2(c)(2). A.R. 2.

D. Tenth Circuit Decision

The court of appeals affirmed the BIA's ruling on the applicability of the post-departure bar and, on that basis, denied petitioner's petition for review. App., *infra*, 12a-15a. The court recognized that the Fourth Circuit has reached a different conclusion, holding that IIRIRA "unambiguously provides an alien with the right to file one motion to reopen [within 90 days], regardless of whether he is within or without the country." *Id.* at 7a (quoting *William* v. *Gonzales*, 499 F.3d 329, 332 (4th Cir. 2007)). But the court below noted that the Tenth Circuit previously had "disagreed with the *William* majority and, instead, reached the same conclusion as the *William*

---

new counsel also informed prior counsel of the complaint and allegations against him. A.R. 137-138. Petitioner's 2008 motion to reopen also included detailed retainer agreements and invoices, A.R. 142-150, as well as a declaration from petitioner recounting his previous counsel's misleading behavior and deficient representation, A.R. 134-136. See generally *Riley* v. *I.N.S.*, 310 F.3d 1253, 1258 (10th Cir. 2002) ("Specifically, the BIA must review Appellant's due diligence along with his attempts to comply with the BIA's requirements detailed in *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (BIA 1988) (claims of ineffective assistance of counsel require a threefold showing: 1) affidavit detailing agreement with counsel, 2) counsel informed of allegations and given opportunity to respond, and 3) complaint filed with disciplinary authorities).")

dissent," upholding "the regulatory post-departure bar as valid under the statutes in question." *Id.* at 9a (citing *Rosillo-Puga* v. *Holder*, 580 F.3d 1147, 1157 (10th Cir. 2009)). The court therefore declared itself bound by circuit precedent and held that "the BIA reasonably determined 8 C.F.R. § 1003.2(d) divests it of jurisdiction to entertain motions to reopen removal proceedings of deported or departed aliens." *Id.* at 15a. Having thus held the post-departure bar dispositive, the court stated that it "need not reach the issue of whether the BIA should have equitably tolled the time and numerical limits on filing motions to reopen * * * in light of the alleged ineffectiveness of Petitioner's former attorney." *Id.*

REASONS FOR GRANTING THE PETITION

As this case demonstrates, the availability of a motion to reopen or reconsider is a matter of more than theoretical or technical importance: Such a motion is intended "to ensure a proper and lawful disposition" of a removal proceeding. *Dada*, 128 S. Ct. at 2318. These motions may be the only avenue for relief from the erroneous and permanent removal of an alien from the United States, as is the case here. Congress accordingly guaranteed aliens the right to make such motions, whether or not they have already departed the United States; that guarantee was an essential component of Congress's decision also to expedite the removal of deportable aliens from the country. The Tenth Circuit's decision in this case, which bars aliens from filing such motions after their departure, cannot be reconciled with the statutory language and congressional purpose. Because that decision also cements an acknowledged conflict in the circuits on a question expressly left open by this Court in *Dada*, further review is in order.

I. The Courts Of Appeal Are Divided Over The Validity of 8 C.F.R. § 1003.2(d).

To begin with, there is a clear and acknowledged conflict between the Fourth and Tenth Circuits (both of which were themselves sharply divided) over the question that this case presents—whether the regulatory post-departure bar on motions to reopen or reconsider before the BIA or an IJ is consistent with the controlling statute. But that is not the extent of the confusion: Seven additional circuits have considered the treatment of post-departure motions to reopen or reconsider and have taken divergent approaches to it. As a result, identically situated persons face different rules regarding post-departure motions to reopen or reconsider in different parts of the country. Because uniformity in this area of the law is essential, further review is warranted for this reason alone.

1. As the Tenth Circuit panel in this case acknowledged, a divided Fourth Circuit panel has held the post-departure bar regulation invalid under IIRIRA because the statute "unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country." *William*, 499 F.3d at 332. Over a lengthy and vigorous dissent by Chief Judge Williams, the Fourth Circuit majority in *William* explained that the statutory language "speak[s] to the filing of motions to reopen by aliens outside the country; it does so because they are a subset of the group (*i.e.* 'alien[s]') which it vests with the right to file these motions." *Ibid.* The Fourth Circuit also reasoned that "the fact that Congress provided for [other] specific limitations on the right to file a motion to reopen bolsters the conclusion that § 1229a(c)(7)(A) [the statu-

tory provision providing aliens the right to file a motion to reopen or reconsider] cannot be read to except from its terms those aliens who have departed the country." *Id.* at 333. And the *William* majority noted that Congress *did* include a physical presence requirement in a *different* subsection of the statute dealing with aliens who apply for relief from removal as victims of domestic violence (*ibid.*), concluding that it "must draw a 'negative inference' from Congress' exclusion of the physical presence requirement from [§ 1229a(c)(7)(A)]." *Ibid.* The *William* decision speaks directly to the question presented in this case and, insofar as is relevant here, William and petitioner are identically situated.

On the other hand, the Tenth Circuit expressly rejected the Fourth Circuit's conclusion in *William* and held the post-departure bar regulation valid, not only in the present case but also in *Rosillo-Puga* and *Silerio-Nunez* v. *Holder*, 356 F. App'x 151 (10th Cir. 2009).[11] In *Rosillo-Puga*, the majority "agree[d] with the [*William*] dissent's position and conclude[d] that 8 C.F.R. § 1003.23(b)(1) (like 8 C.F.R. § 1003.2(d)) is a valid exercise of the Attorney General's Congressionally-delegated rulemaking authority, and does not contravene 8 U.S.C. § 1229a(c)(6)(A) or (7)(A)." *Rosillo-Puga*, 580 F.3d at 1156. The majority believed that "the statute is simply silent on the issue of whether it meant to repeal the post-departure bars" and that "the agency's answer is based on a permissible construction of the statute." *Id.* at 1156-

[11] *William* addresses 8 C.F.R. § 1003.2(d)'s post-departure bar to review by the BIA; *Rosillo-Puga* and *Silerio-Nunez* discuss the issue in the context of 8 C.F.R. § 1003.23(b)(1)'s identical post-departure bar to review by an IJ. No judge on either court suggested that this distinction is material.

1157. In his lengthy dissent, Judge Lucero agreed with the *William* majority that "the pertinent provisions of § 1229a(c)(6)(A) and (7)(A) unambiguously guarantee every alien the right to file one motion to reconsider removability and one motion to reopen removal proceedings, regardless of whether the alien has departed from the United States." *Id.* at 1162 (Lucero, J., dissenting).[12] The Tenth Circuit panel in *Silerio-Nunez*, like the panel in this case, was bound by *Rosillo-Puga* and held the regulation valid under IIRIRA. See *Silerio-Nunez*, 356 F. App'x at 152-153.

There is no denying this conflict. It has been repeatedly acknowledged by the Tenth Circuit and noted by the Ninth. See *Coyt* v. *Holder*, 593 F.3d 902, 907 n.3 (9th Cir. 2010) ("Those circuits are split. The Fourth Circuit has invalidated 8 C.F.R. § 1003.2(d) in its entirety. The Tenth Circuit upheld both [8 C.F.R. § 1003.2(d) and § 1003.23(b)(1)].") (internal citations omitted).

2. While their analysis differs in some particulars from those of the Fourth and Tenth Circuits, seven additional courts of appeals also have considered the treatment of post-departure motions to reopen or reconsider and have adopted divergent rules.[13] Like the Tenth Circuit, the First, Second, Third, Fifth, Sixth, and Eleventh Circuits have held, even after the enactment of IIRIRA, that 8 C.F.R. § 1003.2(d) and § 1003.23(b)(1) bar review of post-

[12] A petition for certiorari in *Rosillo-Puga* was filed almost simultaneously with the petition in this case.

[13] The Seventh Circuit has noted but declined to reach the question whether the regulatory post-departure bar remains valid under IIRIRA. See *Munoz De Real* v. *Holder*, 595 F.3d 747, 749 (7th Cir. 2010).

departure motions to reopen or reconsider. In contrast, the Ninth Circuit, like the Fourth, has held that an alien *may* file a motion to reopen or reconsider after departing the United States, unless the alien departs *while* he or she is the subject of removal proceedings. Therefore, an individual identically situated to petitioner may file a motion to reopen or reconsider in the Fourth Circuit (and in the Ninth Circuit if his or her removal proceedings have ended), but not in the First, Second, Third, Fifth, Sixth, Tenth, or Eleventh.

The Second, Third, Fifth, Sixth, and Eleventh Circuits have enforced post-IIRIRA the regulatory post-departure bar to review of motions to reopen or reconsider. In *Navarro-Miranda* v. *Ashcroft*, 330 F.3d 672 (5th Cir. 2003), the Fifth Circuit applied the regulation without discussing IIRIRA. The court subsequently declined to comment on the merits of the Fourth Circuit's analysis in *William* because it declared itself bound by its decision in *Navarro-Miranda*. See *Castillo-Perales* v. *Mukasey*, 298 F. App'x 366, 369 (5th Cir. 2008).[14] Similarly, without considering any IIRIRA-related arguments, the Sixth Circuit has stated that the post-departure bar regulation precludes an alien from reopening his or her removal proceedings after leaving the country. See *Ablahad* v. *Gonzales*, 217 F. App'x 470, 475 n.6 (6th Cir. 2007); *Mansour* v. *Gonzales*, 470 F.3d 1194, 1198

---

[14] In both *Al-Mousa* v. *Holder*, No. 07-61003, 2010 WL 1141567, at *1 (5th Cir. Mar. 17, 2010), and *Ovalles* v. *Holder*, 577 F.3d 288, 295 (5th Cir. 2009), the Fifth Circuit did not reach the question of whether IIRIRA precludes the regulatory post-departure bar to review of motions to reopen or reconsider because petitioner did not file his motion to reopen within the statutory deadline.

(6th Cir. 2006).[15] The Second, Third, and Eleventh Circuits have all done the same in unpublished decisions. For the Second Circuit, see *Ahmad* v. *Gonzales*, 204 F. App'x 98, 99 (2d Cir. 2006), and *Jalloh* v. *Gonzales*, 181 F. App'x 131, 132 (2d Cir. 2006); for the Third Circuit, see *Tahiraj-Dauti* v. *Attorney General of the United States*, 323 F. App'x 138, 139 (3d Cir. 2009), *Grewal* v. *Attorney General of the United States*, 251 F. App'x 114, 115-116 (3d Cir. 2007), *Oladokun* v. *Attorney General of the United States*, 207 F. App'x 254, 256-257 (3d Cir. 2006), and *Marsan* v. *Attorney General of the United States*, 199 F. App'x 159, 165 (3d Cir. 2006); for the Eleventh Circuit, see *Sankar* v. *United States Attorney General*, 284 F. App'x 798, 799 (11th Cir. 2008).

The First Circuit likewise has held that 8 C.F.R. § 1003.23(b)(1)'s post-departure bar is valid notwithstanding the enactment of IIRIRA, specifically concluding that the regulation had not been displaced by IIRIRA's repeal of 8 U.S.C. § 1105a(c), which formerly read: "An order of deportation * * * shall not be reviewed by any court if the alien * * * has departed from the United States after the issuance of the order." See *Pena-Muriel* v. *Gonzales*, 489 F.3d 438, 441-442 (1st Cir. 2007); see also *id.* at 443 (upholding reasonableness of the Attorney General's "interpretation of the effect of the statutory change on the [post-departure] regulatory bar"). Petitioner thus would not be able to reopen his removal proceedings under the First Circuit rule.

---

[15] In *Uritsky* v. *Holder*, 327 F. App'x 605, 608-609 (6th Cir. 2009), the Sixth Circuit acknowledged but did not need to comment on *William* because petitioner filed his motion to reopen past the statutory deadline and made no equitable tolling arguments.

The Ninth Circuit, on the other hand, has held that an alien *may* file a motion to reopen or reconsider even after being deported because the post-departure regulatory bar "is phrased in the *present* tense and so by its terms applies only to a person who departs the United States while he or she '*is* the subject of removal . . . proceedings.'" *Lin* v. *Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007). Therefore, an individual whose removal proceedings have ended may seek the reopening or reconsideration of those proceedings in the Ninth Circuit even after leaving the country. See *ibid.* (post-departure bar did not apply "[b]ecause petitioner's original removal proceedings were completed when he was removed to China, [and] he did not remain the subject of removal proceedings after that time.").

The upshot of these conflicting approaches is intolerable inconsistency: An alien in precisely the same circumstances as petitioner would have been permitted to seek relief in the Fourth Circuit (and in the Ninth Circuit if no longer the subject of removal proceedings), but not in the First, Second, Third, Fifth, Sixth, Tenth, and Eleventh. This Court's intervention to clarify the law accordingly is essential.

II. The Issue Presented Here Is A Recurring One Of Substantial Practical Importance.

This conflict involves an issue of significant practical importance. As this Court recently acknowledged, "[t]he motion to reopen is an important safeguard intended to ensure a proper and lawful disposition of immigration proceedings." *Kucana* v. *Holder*, 130 S. Ct. 827, 834 (2010) (quoting *Dada*, 128 S. Ct. at 2318) (internal citations omitted). For a significant number of aliens, however, access to this crucial statutory right, as well as the right to file a mo-

tion to reconsider, depends solely on the geography of their appeal: The current conflict implicates nine circuits that together handled the vast majority, over 97%, of BIA appeals filed in 2009. Administrative Office of the U.S. Courts, 2009 Annual Report of the Director: Judicial Business of the U.S. Courts 94 tbl.B-3 (2009). Furthermore, the split stems, in part, from disagreement over the meaning of this Court's recent treatment of motions to reopen in *Dada*. That makes the need for review by this Court especially acute.

A. The Practical Importance Of Motions To Reopen and Reconsider Counsels In Favor Of Review.

The practical importance of the statutory right to move to reopen or reconsider itself counsels in favor of review. Motions to reopen and reconsider are a vital safeguard in a system that has been modified both to expedite the removal of aliens and to reduce the avenues for discretionary relief from removal.

The 1990s saw a range of statutory and administrative reforms to the immigration system that greatly increased the number of aliens eligible for removal, largely by expanding the definition of "aggravated felony" to include additional crimes. See Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 Yale J. on Reg. 47, 63-66 (2010); see also Diana R. Podgorny, *Rethinking the Increased Focus on Penal Measures in Immigration Law as Reflected in the Expansion of the "Aggravated Felony" Concept*, 99 J. Crim. L. & Criminology 287, 295-296 (2009). As more aliens became subject to removal, however, the system increasingly denied them access to discretionary relief. IIRIRA, for example, eliminated so-called

"§ 212(c) waivers" of removal—which had permitted IJs to consider a range of equitable factors in precluding removal—replacing them with a more limited form of relief explicitly denied to aggravated felons. See *I.N.S.* v. *St. Cyr*, 533 U.S. 289, 294-297 (2001).

These changes have led to the removal of ever-increasing numbers of aliens. The number of noncitizens facing removal orders increased dramatically with the enactment of IIRIRA, rising over 64% from 1996 to 1997—twice as much as it had in any of the previous five years. Office of Immigration Statistics, U.S. Dep't of Homeland Sec., Yearbook of Immigration Statistics: 2008, at 95 tbl.36 (2009). Since 1997, that number has grown three-fold, with 358,886 aliens removed in 2008 alone (the latest year for which statistics are available). *Ibid.*

But resolution of removal proceedings is, to put it charitably, not immune from error. This is due, in part, to the BIA's increased use of summary procedures to deal with its "staggering" case backlog. John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 Geo. Immigr. L.J. 1, 23 & 29-31 (2005). See *Dada*, 128 S. Ct. at 2317-18. Under the current rules, a majority of cases are referred to a single Board member for review (instead of to a panel) and Board members may summarily dispose of cases without opinion when they believe that the alien's position lacks a basis in law or fact. Executive Office for Immigration Review, Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999) (establishing streamlined procedure); Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54,878, 54,879 (Aug.

26, 2002) (expanding the procedures to be the "dominant method of adjudication for the large majority of cases before the Board"). Removal errors also frequently stem from the "alarming frequency" of ineffective assistance of counsel in the immigration context. *Aris* v. *Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008). Overburdened and undertrained attorneys often are unequipped to deal with the complexity of the regulatory scheme or the nuances of their client's cases. See LaJuana Davis, *Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings*, 58 Drake L. Rev. 123, 141-143 (2009) (discussing factors contributing to ineffective assistance in immigration proceedings).[16]

In this context, motions to reopen and reconsider serve a necessary and important checking function on removal proceedings. They are, in many situations, an alien's only practical option for presenting previously unavailable evidence that directly bears upon—or may completely preclude—removal, cor-

---

[16] Courts have recognized that the immigration adjudication system "has fallen below the minimum standards of legal justice." *Benslimane* v. *Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (Posner, J.). Courts of appeal and commentators alike have complained of overburdened, biased, and unprofessional IJs and poor legal analysis in immigration decisions. See, *e.g.*, *Wang* v. *Att'y General of U.S.*, 423 F.3d 260, 270 (3d Cir. 2005) (deeming an IJ opinion to be "highly improper" due to its "contemptuous tone" and the IJ's consideration of personal issues irrelevant to the merits of the claim); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 Geo. Immigr. L.J. 595, 598-610 (2009) (noting high IJ caseloads, lack of resources, and sub-par work product). See also Jaya Ramji-Nogales et al., *Refuge Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007) (documenting inconsistencies in asylum grant rates between immigration judges).

recting the mistakes of an ineffective attorney or mistaken immigration judge, or vindicating his or her due process rights.[17]

Motions to reopen are of particular importance as the "primary vehicle" for aliens to seek redress for ineffective assistance of counsel. Maria Baldini-Potermin, *It's Time to Reconsider Automatic Stays of Removal: Petitions for Review, Motions to Reopen, BIA Regulations, and the Race to the Courthouse*, 10-01 Immigr. Briefings 1 (2010). Such motions are found to be meritorious with some frequency. See, *e.g.*, *Aris* v. *Mukasey*, 517 F.3d 595 (2d Cir. 2008) (vacating BIA's denial of motion to reopen on grounds of ineffective assistance where previous attorney failed to properly inform alien about hearing date, which resulted in *in absentia* removal order); *Mai* v. *Gonzales*, 473 F.3d 162, 166 (5th Cir. 2006) (vacating denial of motion to reopen for ineffective assistance of counsel where previous attorney admitted to a ground for removal over alien's strong denial of the charge, supported by affidavits and witnesses, "cut[ting] off all available avenues of relief" for the alien); *Singh* v. *Ashcroft*, 367 F.3d 1182 (9th Cir. 2004) (directing BIA to grant motion to reopen where alien's previous lawyer failed to file a brief in support of appeal to the BIA without informing alien, resulting in summary dismissal of appeal). This is unsurprising, as an alien is likely to be unaware of the attorney's mistakes until after the entry of a final removal order. See, *e.g.*, *Aris*, 517 F.3d at 598 (2d Cir.

---

[17] Over 12,000 such motions were filed with immigration judges in 2008. Office of Planning, Analysis & Technology, Executive Office for Immigration Review, FY 2009 Statistical Yearbook at B7 fig.2 (2009). In the same year, the BIA received 7,823 motions to reopen (not including IJ appeals). *Id.* at T2 tbl.16.

2008) (alien remained unaware of removal order against him for "nearly a decade," as it was entered *in absentia*). A rule that altogether denies aliens who have departed the country recourse for such errors is therefore one of substantial importance.

B. Court of Appeals Confusion Over *Dada* v. *Mukasey* Requires Resolution By This Court.

Apart from the practical importance of the statutory right at stake, the specific question whether the post-departure bar is valid requires this Court's resolution because it stems, in part, from inconsistent interpretations of this Court's recent decision in *Dada*. In *Dada*, the Court affirmed the statutory right to pursue a motion to reopen and held that, so as to "safeguard" that right, an alien must be permitted to withdraw a request for voluntary departure that, if granted, would trigger the §§ 1003.2(d) and 1003.23(b)(1) departure bar and preclude decision of the motion. 128 S. Ct. at 2319. (The question of the validity of the post-departure bar was not before the Court. *Id.* at 2320.)

Although the Fourth Circuit's *William* decision predates *Dada*, both the majority in the Tenth Circuit's controlling *Rosillo-Puga* decision and the dissent, which relied on *William*, cited *Dada* for support. The majority relied on *Dada* for the proposition that "[t]he very problem identified by the Supreme Court in *Dada* would not exist but for the validity of the regulation challenged here—the alien's motion to reopen would not be withdrawn but for the regulation" (*Rosillo-Puga*, 580 F.3d at 1153 n.3)—although the majority acknowledged that "neither party in *Dada* specifically challenged the validity of the regulations at issue," *id.* The dissent, in sharp contrast, believed that *Dada* "all but compels the conclusion"

that IIRIRA trumps the departure bar because *Dada* recognized that "an alien *must* be allowed to file one motion to reopen" and "an alien cannot be forced by regulation to forfeit a motion guaranteed by statute." *Id.* at 1162, 1169 (Lucero, J., dissenting).

This Court noted in *Dada* that "[a] more expeditious solution to the untenable conflict between the voluntary departure scheme and the motion to reopen might be to permit an alien who has departed the United States to pursue a motion to reopen post-departure." 128 S. Ct. at 2320. But because the post-departure bar regulation was "not * * * challenged in these proceedings, [the Court did] not consider it" in *Dada*. *Ibid.* The regulation is challenged in this case, however. The Court accordingly should take the opportunity presented here to answer the question left open in *Dada*.

III. The Tenth Circuit's Decision Is Wrong.

The significance of the conflict in the courts of appeals itself warrants review. It should be added, though, that the decision below is incorrect. The plain language and structure of IIRIRA show that Congress meant to displace the departure bar, as does the broader congressional purpose. And the evolution of immigration law has decoupled physical location from jurisdiction to resolve removal disputes, making an alien's physical presence in the United States increasingly irrelevant to the jurisdiction of the court reviewing his or her case. In the current statutory regime, the regulatory departure bar is an incongruous anomaly.

1. Congress provided in 8 U.S.C. § 1229a(c)(7)(A) that "[a]n alien may file one motion to reopen any proceeding[] under this section." This "statutory text

is plain insofar as it guarantees each alien the right to file 'one motion to reopen proceedings under this section'" (*Dada*, 128 S. Ct. at 2316): there is no exception for aliens who have departed the United States. "We 'must presume that [the] legislature says in a statute what it means and means in a statute what it says there'" (*Dodd* v. *United States*, 545 U.S. 353, 357 (2005) ((alteration in original) (quoting *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249 (1992))); all aliens, regardless of location, are treated alike and have a right to file a motion to reopen. See *Rosillo-Puga*, 580 F.3d at 1162 (Lucero, J., dissenting) ("A plain reading of 8 U.S.C. § 1229a(c)(6)(A) and (7)(A) comfortably occupies all the space on the issue before us and leaves any potential for valid promulgation of the challenged portion of 8 C.F.R. § 1003.23(b)(1) outside in the bitter cold."); *William*, 499 F.3d at 332 ("We find that § 1229a(c)(7)(A) unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country."); *Azarte* v. *Ashcroft*, 394 F.3d 1278, 1285-1286 (9th Cir. 2005) ("With respect to motions to reopen * * *, Congress' language in IIRIRA is clear and unambiguous * * *."). The Attorney General may not rewrite an Act of Congress by mandating the exclusion of a subclass of aliens that Congress unambiguously intended to reach. See *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

In contrast, another subsection of 8 U.S.C. § 1229a distinguishes between aliens within and without the United States, providing that the usual 90-day time limit for a motion to reopen does not apply to a battered spouse, child, or parent who "is physically present in the United States at the time of filing the motion." § 1229a(c)(7)(C)(iv)(IV). Congress

therefore plainly knew how to limit certain forms of relief to aliens currently in the United States, and it chose not to impose such a limit in § 1229a(c)(6)(A) and (7)(A). See *Clay* v. *United States*, 537 U.S. 522, 528 (2003) ("When 'Congress includes particular language in one section of a statute but omits it in another section of the same Act,' we have recognized, 'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983))). Indeed, if physical presence in the United States were required for *any* alien to file a motion to reopen, the language in § 1229a(c)(7)(C)(iv)(IV) requiring that specified aliens be "physically present" would be superfluous.[18]

The statute also includes several express limitations on motions to reopen, including those on timeliness (§ 1229a(c)(6)(B), (7)(C)), content, (§ 1229a(c)(6)(C), (7)(B)), and numerosity (§ 1229a(c)(6)(A), (7)(A)). But § 1229a includes no limitation on geography. When Congress makes the scope of its intention clear by providing for certain limitations and exceptions, the lack of other limitations and exceptions should be read to indicate Congress's decision *not* to include them. *United States* v.

---

[18] The majority in *Rosillo-Puga* opined that § 1229a(c)(7)(C)(iv)(IV)'s physical-presence requirement is unhelpful in discerning what Congress intended when it enacted IIRIRA in 1996 because that requirement was not added to the statute until 2006. 580 F.3d at 1154-55. But if the majority's reading were correct—if there is a physical presence requirement implicit in § 1229a(c)(6)(A) and (7)(A)—adding the physical-presence language in 2006 would have been unnecessary. That language presumably was added *because* § 1229a(c)(6)(A) and (7)(A) contains no such requirement. *Id.* at 1165-1166.

Johnson, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference * * * is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."). Thus, it is properly inferred that Congress intentionally eschewed a geographical limitation on aliens filing motions to reopen.

2. The legislative background of IIRIRA supports this conclusion. Congress intended IIRIRA "to make it easier to deny admission to inadmissible aliens and easier to remove deportable aliens from the United States." H.R. Rep. No. 104-469, pt. 1, at 157 (1996). Needless to say, allowing aliens to file motions *after they have been removed* is fully consistent with—and may even facilitate—this goal. One of Congress's primary concerns in enacting IIRIRA was the amount of time it took to deport aliens who had committed crimes.[19] This concern with efficient re-

---

[19] See *Members' Forum on Immigration: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 38 (1995) (statement of Rep. Susan Molinari) ("The criminal alien population, which has an extremely high rate of recidivism, can be curbed by simply improving deportation procedures, thus saving our local communities millions of dollars by providing them with much more safety. It also frees up desperately needed jail space."); *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 15 (1995) (statement of T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service) ("The administration is committed to ensuring that aliens in deportation proceedings are afforded appropriate due process; however, the availability of multiple layers of judicial review has frustrated the timely removal of deportable aliens."); *Proposals for Immigration Reform: Hearing Before the Subcomm. on Immigration*

moval, however, is a "non-sequitur" with respect to allowing aliens *already outside of the country* to file motions to reopen and reconsider. *Rosillo-Puga*, 580 F.3d at 1167 (2009) (Lucero, J., dissenting). As these aliens have already left the United States prior to filing, there is no danger that they will use motions to reopen or reconsider as a "means of delaying removal." *Id.* at 1168. Indeed, if these filings were barred, Congress would have created a disincentive for aliens to leave the country, leading them to withdraw motions for voluntary departure or to refuse to comply with removal orders, thus adding to the original problem that Congress sought to address. See *Dada*, 128 S. Ct. at 2320.

Nor would allowing post-departure motions result in an unmanageable increase in filings. IIRIRA still "limits in significant ways the availability of the motion to reopen" (*Dada*, 128 S. Ct. at 2316), most importantly through filing deadlines and numerical limits. These procedural limits greatly restrict the number of aliens eligible to file such motions, absent grounds (such as ineffective assistance of counsel) for equitable tolling or *sua sponte* reopening or reconsideration by the BIA or an IJ. The BIA's streamlined summary procedures also allow the Board to easily dispose of facially invalid or frivolous motions. And, of course, "immigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when

---

and Refugee Affairs of the S. Comm. on the Judiciary, 103d Cong. 15 (1994) (statement of Hon. Barbara Jordan, Chair, Commission on Immigration Reform) ("The top priority of interior enforcement strategies should be the removal of deportable criminal aliens from the U.S. in such a way that the potential for their return to the U.S. will be minimized.").

justice is done." *In re S-M-J-*, 21 I. & N. Dec. 722, 727 (BIA 1997).

3. Finally, Congress created the statutory right to seek reopening or reconsideration as part of a comprehensive revision of the law governing when an alien's physical location should (and should not) bear on judicial review of his or her immigration status. Pre-IIRIRA, courts of appeals lacked jurisdiction to review the deportation order of an alien who had already left the United States (8 U.S.C. § 1105a(c) (1994)), and so most aliens were able to obtain an automatic stay of their removal order while judicial review was pending. *Id.* § 1105a(a)(3). Interested in more efficient removal, Congress in IIRIRA rendered aliens' location irrelevant to the jurisdiction of reviewing courts. Among other things, IIRIRA lifted the statutory bar to judicial review of deportation orders for aliens who had departed the country. See pages 5-6, *supra*; *Nken* v. *Holder*, 129 S. Ct. 1749, 1755 (2009). The statutory right to move to reopen regardless of location is of a piece with that reform.

Having made these changes, Congress also repealed the presumption of an automatic stay of removal pending completion of judicial review and restricted the availability of injunctive relief to preclude removal. See *Nken*, 129 S. Ct. at 1755-56. In light of this decoupling of jurisdiction from physical presence in the United States, the post-departure bar on motions to reopen or reconsider remains as a living dinosaur from a bygone era. It should not survive Congress's substantial revision of immigration law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SCOTT L. SHUCHART
Yale Law School Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

KARI E. HONG
Law Offices of Kari E. Hong
1300 Clay, Ste. 600
Oakland, CA 94612
(510) 384-4524

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

MAY 2010

APPENDICES

TABLE OF CONTENTS

Page

A. Opinion and Order, *Mendiola* v. *Holder*, No. 08-965, 585 F.3d 1303 (10th Cir. Oct. 28, 2009) 1a

B. Order, *In re Eddie Mendiola* (BIA Oct. 8, 2008) (*per curiam*) 16a

C. Order Denying Rehearing, *Mendiola* v. *Holder*, No. 08-965 (10th Cir. Dec. 30, 2009) 18a

APPENDIX A

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

October 28, 2009

EDDIE MENDIOLA,

Petitioner,

v.

ERIC H. HOLDER, JR., United States Attorney General,

Respondent.

No. 08-965

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

Before **MURPHY**, **BALDOCK**, and **HARTZ**, Circuit Judges.

BALDOCK, Circuit Judge.

Petitioner Eddie Mendiola petitions this Court to review the Board of Immigration Appeals' (BIA or Board) denial of his second motion to reopen his removal proceedings. As a threshold matter, Petitioner argues the BIA erred in holding that 8 C.F.R. § 1003.2(d) proscribed its jurisdiction to entertain his motion to reopen. Section 1003.2(d) provides:

> A motion to reopen or a motion to reconsider [before the BIA] shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

See also 8 C.F.R. § 1003.23(b)(1) (containing an identical post-departure bar to motions to reopen or reconsider before an immigration judge). Petitioner further contends that, in light of his former attorney's alleged ineffectiveness, the BIA erred in declining to equitably toll the time and numerical limits on his motion to reopen his removal proceedings found in 8 C.F.R. § 1003.2(c)(2). Section 1003.2(c)(2) provides: "[A]n alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened."

We have jurisdiction over the petition under 8 U.S.C. § 1252(a)(2)(D), which preserves our power to decide "constitutional claims or questions of law raised upon a petition for review." The questions Petitioner raises in this petition are purely legal in nature and, therefore, fit comfortably within the confines of § 1252(a)(2)(D). Our review is de novo. *Lorenzo v. Mukasey*, 508 F.3d 1278, 1282 (10th Cir. 2007). We conclude that we are bound by our recent

precedent in *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009), and we therefore deny the petition for review.

I.

Petitioner became a lawful permanent resident of the United States in 1989. The Department of Homeland Security (DHS) initiated removal proceedings against him in 2004 based on, among other things, two state convictions for possession of steroids. After an administrative hearing, an immigration judge (IJ) ruled Petitioner removable and ordered him removed to Peru.[1] Petitioner appealed the IJ's decision to the BIA. The BIA affirmed. Petitioner then filed a petition for review with us, which we denied. *Mendiola v. Gonzales*, 189 Fed. App'x. 810 (10th Cir. 2006) (unpublished). While his petition for review was pending, Petitioner was removed from the United States in March 2005. He returned illegally, however, and was detained on a charge of

---

[1] Aliens convicted of an aggravated felony are removable. 8 U.S.C. § 1227(a)(2)(A)(iii). An "aggravated felony" includes "a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B). In turn, a "drug trafficking crime means any felony punishable under the Controlled Substances Act." 18 U.S.C. § 924(c)(2). The Controlled Substances Act categorizes anabolic steroids as a controlled substance. 21 U.S.C. § 218. It also prohibits the possession of a controlled substance, unless validly authorized by a practitioner, and punishes possession of a controlled substance after a prior state drug offense conviction by up to two years in prison. 21 U.S.C. § 844(a). A "drug offense" is "any offense which proscribes the possession, distribution, manufacture, cultivation, sale . . . [of] any substance the possession of which is prohibited under this subchapter." 21 U.S.C § 844(c). The IJ, therefore, concluded Petitioner was removable as an aggravated felon.

Reentry after Removal for an Aggravated Felony in violation of 8 U.S.C. § 1326.[2]

After he returned to the United States illegally and while in federal custody, Petitioner in 2007 filed his first motion to reopen with the BIA. The BIA determined that 8 C.F.R. § 1003.2(d) deprived it of jurisdiction to consider Petitioner's motion to reopen because the regulation prohibits a person who is the subject of removal proceedings from filing a motion to reopen subsequent to his departure from the country. The BIA also noted that his motion, aside from being jurisdictionally barred, was untimely because Petitioner, contrary to § 1003.2(c)(2), filed it well beyond 90 days after the final 2004 administrative order that made him removable. Petitioner in 2007 filed another petition for review in our court. In his opening brief, Petitioner failed to argue that § 1003.2(d) did not apply to him. We, therefore, refused to consider this argument and deemed Petitioner's motion barred. *Mendiola v. Mukasey*, 280 Fed. App'x. 719, 722 (10th Cir. 2008) (unpublished).

At some point after our denial of Petitioner's second petition for review, he obtained new counsel. New counsel in 2008 filed a second motion to reopen Petitioner's case with the BIA. Petitioner based his second motion to reopen upon his former attorney's ineffectiveness and a California court's reduction of his second steroid possession conviction from a felony to a misdemeanor in 2007. DHS opposed Petitioner's motion. The BIA ultimately denied Petitioner's second motion to reopen, concluding again that Petitioner was "precluded by 8 C.F.R. § 1003.2(d) from

---

[2] In August 2008, this charge was dismissed without prejudice on the Government's motion pursuant to Fed. R. Crim. P. 48(a).

reopening proceedings and [it] lack[ed] authority to reopen or reconsider *sua sponte* pursuant to 8 C.F.R. § 1003.2(a)." The BIA also noted that, in any case, Petitioner's motion was, again, untimely and now also numerically barred under § 1003.2(c)(2) because "an alien may only file one motion to reopen removal proceedings . . . and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened." Petitioner now brings the present petition of review, challenging the BIA's conclusion that it could not properly consider the arguments raised in his second motion to reopen.

II.

The Attorney General in 1952 first promulgated the regulatory post-departure bar to motions to reopen or reconsider before the BIA and an IJ: "A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States." 17 Fed. Reg. 11,469, 11,475 (Dec. 19, 1952) (originally codified at 8 C.F.R. § 6.2); *see* 8 C.F.R. § 1003.2(d) (containing an identical, current limit on motions to reopen and reconsider exclusion, deportation, or removal proceedings before the BIA); *id.* § 1003.23(b)(1) (containing an identical, current limit on motions to reopen and reconsider exclusion, deportation, or removal proceedings before an IJ); *see also In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 648 (BIA 2008) (detailing the history of the post-departure bar to motions to reopen and reconsider). In 1961, Congress placed a similar statutory limit on federal courts: "An order of deportation or of exclusion shall not be reviewed by any court if the alien . . . has departed from the United States after

issuance of the order." 8 U.S.C. § 1105a(c) (1962) (repealed). Consequently, for fifty years the BIA has consistently followed this "jurisdictional principle," holding "that reopening is unavailable to any alien who departs the United States after being ordered removed." *Armendarez-Mendez*, 21 I. & N. Dec. at 648.

Congress, in September 1996, passed significant immigration reform known as the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Pub. L. No. 104-208, 110 Stat. 3009; *see also Rosillo-Puga*, 580 F.3d at 1152. First, Congress "repealed the statutory bar to *judicial* review of deportation orders when the alien had departed the country. . . ." *Rosillo-Puga*, 580 F.3d at 1152 (emphasis added). Second, Congress incorporated in the IIRIRA the Attorney General's recently promulgated regulatory numerical and time limits on motions to reopen and reconsider before an IJ and the BIA: "An alien may file one motion to reopen proceedings under this section," which must generally be filed "within 90 days of the date of entry of the final administrative order of removal." 8 U.S.C. §§ 1229a(c)(7)(A) and (7)(C)(I). Congress did not, however, include any explicit post-departure bar to judicial review, which had previously existed in the former § 1105a(c), nor any explicit post-departure bar to motions to reopen or reconsider before the BIA and an IJ. *Rosillo-Puga*, 580 F.3d at 1152. The following year, the Attorney General implemented the IIRIRA by issuing new regulations, which "retained the post-departure bar for motions to reopen before an IJ and the BIA." *Id.*; *see* 8 C.F.R. § 1003.2(d); *id.* § 1003.23(b)(1).

After briefing concluded in this case, we decided *Rosillo-Puga*. In *Rosillo-Puga*, the petitioner was re-

moved to Mexico in 2003 pursuant to an IJ's order. *Rosillo-Puga*, 580 F.3d at 1149. Three years later, Rosillo-Puga filed a motion to reopen his proceedings with the IJ, invoking the immigration court's sua sponte authority under 8 C.F.R. § 1003.23(b)(1). *Id.* The IJ denied his motion. The BIA affirmed the IJ's denial of Rosillo-Puga's motion to reopen because "8 C.F.R. § 1003.23(b)(1) deprived the immigration court of jurisdiction over motions to reopen or reconsider made by aliens subsequent to their departure from the United States." *Id.* at 1150. In his petition for review of the BIA's decision, Rosillo-Puga challenged the validity of the regulatory post-departure bar to motions to reopen, arguing it contravenes 8 U.S.C. § 1229a(c)(7), which contains numerical and time limits on motions to reopen. *Id.* at 1153.

Relying on *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007), Rosillo-Puga argued Congress's adoption of 8 U.S.C. § 1229a(c)(7)(A) and (7)(C) rendered the regulatory post-departure bar invalid because it restricts "'the availability of motions to reopen to those aliens who remain in the United States.'" *Id.* (quoting *William*, 499 F.3d at 334). The majority in *William*, over a vigorous dissent by Chief Judge Williams, "concluded 'that § 1229a(c)(7)(A) unambiguously provides an alien with the right to file one motion to reopen [within 90 days], regardless of whether he is within or without the country.'" *Id.* at 1154 (quoting *William*, 449 F.3d at 332). For this reason, the Fourth Circuit held the regulatory post-departure bar on motions to reopen, "'conflicts with

the statute . . . [and] lacks authority and is invalid.'" *Id.* (quoting *William*, 449 F.3d at 334).[3]

---

[3] Other circuits have wrestled with the meaning of the regulatory post-departure bar, but the Fourth Circuit is the only other circuit to have addressed whether it conflicts with 8 U.S.C. § 1229a(c)(7). The First Circuit in *Pena-Muriel v. Gonzales*, 489 F.3d 438 (1st Cir. 2007), evaluated whether Congress's repeal of the statutory post-departure bar to federal judicial review in the IIRIRA evidenced Congress's intent to eliminate the regulatory post-departure bar. *Pena-Muriel*, 489 F.3d at 441. The court concluded because the regulatory post-departure bar had existed prior to and independently of the statutory post-departure bar, Congress's *removal* of the statutory post-departure bar in 1996 did not alone "abrogate the Attorney General's authority to continue to enforce the limitations of 8 C.F.R. § 1003.23(b)(1)" (which contains an identical limit on motions to reopen and reconsider before an IJ as § 1003.2(d) does before the BIA). *Id.* The court then determined that the statute was silent or ambiguous on whether Congress intended the Attorney General to no longer enforce the regulatory post-departure bar and, therefore, deferred to the agency's interpretation of the statute under Chevron. *Id.* at 441–42. In the end, the First Circuit decided the Attorney General's continued enforcement of the regulatory post-departure bar was a reasonable interpretation of his authority under the statute. *Id.* at 443. The First Circuit, however, noted in its denial of a motion for rehearing that it did not decide whether the post-departure bar conflicted with 8 U.S.C. § 1229a(c)(7). *Pena-Muriel v. Gonzales*, 510 F.3d 350, 350 (1st Cir. 2007) (denial of rehearing en banc). A petitioner recently asked the Fifth Circuit in *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009), to follow the Fourth Circuit in invalidating 8 C.F.R. § 1003.2(d) due to 8 U.S.C. § 1229a(c)(7). The court determined the petitioner's motion to reopen, filed three years after the BIA's final order of removal, was well outside of the 90 day limit those statutory sections placed upon motions to reopen. *Ovalles*, 577 F.3d at 295. Because the petitioner invoked statutory sections that offered him no relief to invalidate the regulatory post-departure bar, the Fifth Circuit refused to pass judgment on *William*'s holding. *Id.* at 296.

In *Rosillo-Puga*, we disagreed with the *William* majority and, instead, reached the same conclusion as the *William* dissent. Employing the *Chevron* framework for reviewing an agency's construction of the statute it administers, *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), we first analyzed Congress's statutory language. *Rosillo-Puga*, 580 F.3d at 1156–57. We found that language "simply silent on the issue of whether it meant to repeal the post-departure bars contained in the Attorney General's regulations." *Id.* at 1157 (citing *Chevron*, 467 U.S. at 843) (internal quotations omitted). Next, we turned to the second prong of the *Chevron* inquiry—whether the agency's interpretation is "based on a permissible construction of the statute." *Id.* (citing *Chevron*, 467 U.S. at 843) (internal quotations omitted). Believing "it inconceivable that Congress would repeal the post-departure bar, without doing or even saying anything about the forty-year history of the Attorney General incorporating such a bar in his regulations," we upheld the regulatory post-departure bar as valid under the statutes in question. *Id.* We concluded that the regulatory post-departure bar "is a valid exercise of the Attorney General's Congressionally-delegated rulemaking authority, and does not contravene 8 U.S.C. § 1229a(c)(7)(A) or (7)(C)." *Id.* at 1156. In so doing, we rejected the argument, made by *Rosillo-Puga* and accepted by the Fourth Circuit, that the statutory language intended to provide all aliens, even those who had departed the United States, the right to file one motion to reopen within 90 days. *Id.* at 1156–57. We consequently upheld the BIA's conclusion that the regulatory post- departure bar deprives it and an IJ of jurisdiction over motions to reopen filed by aliens who departed the United States subsequent to

the completion of their removal proceedings. *Id.* at 1157–60.[4] Additionally, we upheld as reasonable the BIA's conclusion that the regulatory post-departure bar deprived it and an IJ of their authority to reopen sua sponte a proceeding of an alien who had departed the United States. *Id.*; *see* 8 C.F.R. § 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."); *id.* § 1003.23(b)(1) ("An [IJ] may upon his or her own motion at any time . . . reopen or reconsider any case in which he or she has made a decision. . . ."); *see also Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 676 (5th Cir. 2003) (upholding as reasonable the BIA's interpretation that the post-departure bar removes its jurisdiction, including

---

[4] The entire panel in *Rosillo-Puga* agreed that the post-departure bar, assuming its validity, prohibited motions to reopen filed by or on behalf of those aliens who, like Rosillo-Puga, had departed the country after the conclusion of their removal proceedings. *See Rosillo-Puga*, 580 F.3d at 1171, n.14 (Lucero, J., dissenting) ("Assuming the challenged portion of § 1003.23(b)(1) is valid, I agree that the regulation applies to Rosillo-Puga. . . ."). The Fifth Circuit has reached the same conclusion. *See Ovalles*, 577 F.3d at 298 ("We conclude that the post-departure bar on motions to reconsider and to reopen applies and was intended to apply to aliens who depart the country following the termination of their removal proceedings."). In contrast, the Ninth Circuit has concluded the post-departure bar "is phrased in the *present* tense and so by its terms applies only to a person who departs the United States while he or she '*is* the subject of removal . . . *proceedings*'" *and not to a person* who departs the United States after the completion of his or her removal proceedings. *Lin v. Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007) (quoting 8 C.F.R. § 1003.23(b)(1) (emphasis added)).

its sua sponte authority, to reopen the removal proceedings of a deported alien).[5]

---

[5] In *Rosillo-Puga*, Judge O'Brien issued a concurring opinion, but joined the Court's opinion (per Anderson, J.) in full to avoid leaving this issue unresolved in our circuit. *Rosillo-Puga*, 580 F.3d at 1161 (O'Brien, J., concurring). Judge O'Brien stated he would have preferred to settle *Rosillo-Puga*, as the Fifth Circuit had settled *Ovalles*, by concluding the petitioner's motion to reopen was untimely under the very statutory provisions he invoked to invalidate the regulatory post-departure bar. *Id.* (O'Brien, J., concurring). Such a holding would have allowed the panel to avoid deciding whether the regulatory post-departure bar contravenes the statutory provisions. *Id.* (O'Brien, J., concurring).

Judge Lucero issued a dissent, concluding 8 U.S.C. § 1229a(c)(7) "unambiguously guarantee[s] every alien the right to file . . . one motion to reopen removal proceedings, regardless of whether the alien has departed from the United States." *Id.* at 1162 (Lucero, J., dissenting). For this reason, he would have invalidated the post-departure bar under the first step of *Chevron*. *Id.* (Lucero, J., dissenting). Judge Lucero additionally noted that the Supreme Court's decision in *Dada v. Mukasey*, 128 S.Ct. 2307 (2008), "supports the conclusion that the post-departure bar is inconsistent with" the statute because it "held all aliens have a 'statutory right' to file one motion to reopen" pursuant to § 1229a(c)(7). *Id.* at 1168 (Lucero, J., dissenting). But assuming the regulatory post-departure bar valid, Judge Lucero went on to address whether the post-departure bar is consistent with the regulatory sua sponte authority of the BIA and an IJ to reopen or reconsider proceedings. Judge Lucero discerned no conflict between those provisions. *Id.* at 1170 (Lucero, J., dissenting). The regulatory provisions allow an IJ and the BIA to reopen or reconsider a proceeding at any time, whereas, the post-departure bar says nothing about the power of an IJ or the BIA. *Id.* (Lucero, J., dissenting). "Rather, it provides that '[a] motion to reopen or to reconsider *shall not be made* by a person . . . subsequent to this or her departure from the United States.'" *Id.* (Lucero, J., dissenting) (quoting 8 C.F.R. § 1003.23(b)(1)). He consequently reasoned, assuming the post-

III.

Prior to oral argument, we asked the parties in this case to be prepared to discuss *Rosillo-Puga*'s application. Petitioner conceded at oral argument that *Rosillo-Puga* divests the BIA of its sua sponte authority as set forth in 8 C.F.R. § 1003.2(a) to reopen his proceedings because he had departed the United States. As best we can discern, however, Petitioner contends *Rosillo-Puga* did not extend the post-departure bar's application to motions to reopen filed by aliens pursuant to 8 C.F.R. § 1003.2(c) where the motion alleges ineffective assistance of counsel rising to the level of a due process violation.[6] Petitioner de-

---

departure bar's validity, that "although an alien may not move for reconsideration or reopening following departure, an IJ [or the BIA] always retains the discretionary authority to sua sponte reopen or reconsider a case." *Id.* (Lucero, J., dissenting).

[6] We note, for the sake of clarity, that 8 C.F.R. § 1003.2(c) sets forth the procedural restrictions and requirements for motions to reopen filed by or on behalf of aliens before the BIA. It also details specific exceptions, which are not relevant to this case, to its time and numerical limits on motions to reopen. It does not, however, provide a specific mechanism for challenging removal proceedings on the basis of ineffective assistance of counsel. But the BIA has stated ineffective assistance may constitute "a valid ground for reopening a deportation case in egregious circumstances." *In re Lozada*, 191 I. & N. Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Although no Sixth Amendment right to counsel exists in deportation proceedings, our precedent establishes that an alien may predicate an ineffective assistance of counsel claim on his Fifth Amendment right to due process. *See Osei v. I.N.S.*, 30[illegible] F.3d 1205, 1208 (10th Cir. 2002); *Akinwunmi v. I.N.S.*, 194 F.3d 1340, 1341 n.2 (10th Cir. 1999). To establish a Fifth Amendment violation, an alien must demonstrate not only that his counsel was ineffective, but also that as a result of his counsel's ineffectiveness he was "denied a fundamentally fair proceeding." *Tang v. Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003).

clined our invitation to file supplemental briefing on that question.

In pertinent part, 8 C.F.R. § 1003.2(c)(2) states, except in limited instances inapplicable here, "an alien may file only one motion to reopen removal proceedings (whether before the Board or the [IJ]) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened." Notably, this mirrors the language in 8 U.S.C. § 1229a(c)(7) that we examined in *Rosillo-Puga*. We concluded in *Rosillo-Puga* that Congress's provision for one motion to reopen within 90 days of removal in those statutory subsections does not alter the valid continued operation of the regulatory post-departure bar to motions to reopen. *Id.* at 1156. We upheld the BIA's interpretation that the regulatory post-departure bar divests it and an IJ of jurisdiction to consider motions to reopen the removal proceedings of deported or departed aliens, even where statute provides an alien may file one motion to reopen within 90 days. *Id.* Moreover, the entire panel in *Rosillo-Puga* agreed that, at a minimum, because the post-departure bar states "'[a] motion to reopen or to reconsider shall not be made by . . . a person . . . subsequent to his or her departure from the United States'. . . . an alien may not move for reconsideration or reopening following departure." *Id.* at 1170 (Lucero, J., dissenting). As § 1003.2(c)(2) details the requirements with which an alien filing a motion to reopen must comply, it seems the entire panel agreed

that the post-departure bar applied, at the very least, to subsection (c).[7]

We may not overrule another panel of this court. "We are bound by the precedent of prior panels absent en banc consideration or a superseding contrary decision by the Supreme Court." *In re Smith*, 10 F.3d 724, 724 (10th Cir. 1993); *see also United States v. Edward J.*, 224 F.3d 1216, 1220 (10th Cir. 2000) (concluding stare decisis prevents one panel from overturning the decision of another panel of this court "barring en banc reconsideration, a superseding contrary Supreme Court decision, or authorization of all currently active judges on the court"). Moreover, the "precedent of prior panels which [we] must follow includes not only the very narrow holdings of those prior cases, but also the reasoning underlying those holdings, particularly when such reasoning articulates a point of law." *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000). Stare decisis thus dictates we conclude the BIA correctly determined 8 C.F.R. § 1003.2(d)'s post-departure bar divests it of jurisdiction to review a motion to reopen filed by a removed alien, like Petitioner, even though relevant regulations allow an alien to file one motion to reopen within 90 days.

---

[7] We realize, as discussed above, that the panel disagreed as to the validity of the regulatory post-departure bar in light of 8 U.S.C § 1229a(c)(7) and as to what effect, if any, the regulatory post-departure bar had upon the BIA and an IJ's sua sponte authority to reopen removal proceedings. But we believe it is significant that, as a threshold matter, the entire panel agreed the post-departure bar, if valid, would prevent aliens who have left the country following the completion of their removal, deportation, or exclusion proceedings from filing motions to reopen on their behalf.

We are not alone in our approach to Petitioner's arguments. In *Canchola-Velez v. Filip*, 307 Fed. App'x. 871 (5th Cir. 2009) (unpublished), the petitioner had already departed the United States when he filed his motion to reopen with the BIA. In his appeal of the BIA's denial of his motion to reopen, he asserted "that his former attorney's ineffectiveness amounted to a denial of due process that justifies reopening [his] proceedings on equitable grounds." *Canchola-Velez*, 307 Fed. App'x. at 872. The Fifth Circuit had previously in *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 675–76 (5th Cir. 2003), "upheld as reasonable the BIA's interpretation of 8 C.F.R. § 1003.2(d) . . . as removing its jurisdiction to reopen the removal proceedings of a deported alien." *Id.* The court thus concluded stare decisis required it to defer to the BIA's holding it had no jurisdiction to reopen the petitioner's proceedings and reject his due process claim. *Id.* Consequently, the Fifth Circuit determined it need not decide whether the ineffectiveness of the petitioner's former attorney tolled the statute of limitations for filing a motion to reopen. *Id.* Similarly, we are bound by *Rosillo-Puga*'s conclusion the BIA reasonably determined 8 C.F.R. § 1003.2(d) divests it of jurisdiction to entertain motions to reopen removal proceedings of deported or departed aliens. We, therefore, need not reach the issue of whether the BIA should have equitably tolled the time and numerical limits on filing motions to reopen found in 8 C.F.R § 1003.2(c) in light of the alleged ineffectiveness of Petitioner's former attorney.

The petition for review is DENIED.

APPENDIX B

DECISION OF THE BOARD OF IMMIGRATION APPEALS

File: A092 099 498 Date: Oct 7 2008

In re: EDDIE *MENDIOLA*

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

Kari Hong, Esquire

ON BEHALF OF DHS:

Cathy A. Auble
Senior Attorney

ORDER:

PER CURIAM. The motion to reopen exceeds the numerical limitations for motions to reopen and will be denied. The regulations provide that motions to reopen shall be limited to one motion to reopen, with certain exceptions not pertinent here. *See* 8 C.F.R. § 1003.2(c)(2). The respondent's second motion to reopen is therefore barred by numerical limitations. The final order in these proceedings was entered by the Board on November 9, 2004. The motion to reopen has also been filed out of time and will be denied for that reason as well. 8 C.F.R. § 1003.2(c)(2). Further, we note that the respondent was removed from the United States on March 2, 2005. The respondent is precluded by 8 C.F.R. § 1003.2(d) from reopening proceedings and we lack authority to reopen or reconsider *sua sponte* pur-

suant to 8 C.F.R. § 1003.2(a); *Matter of Crammond*, 23 I&N Dec. 179 (BIA 2001).

Accordingly, the motions to reopen and reconsider are denied.

[*signed*]

FOR THE BOARD

APPENDIX C

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

December 30, 2009

EDDIE MENDIOLA,

Petitioner,

v.

ERIC H. HOLDER, JR., United States Attorney General,

Respondent.

No. 08-965

ORDER

Before **MURPHY**, **BALDOCK**, and **HARTZ**, Circuit Judges.

Petitioner's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

ELISABETH A. SHUMAKER, Clerk

172

(2)

Supreme Court, U.S.
FILED
SEP 27 2010

No. 09-1378

In the Supreme Court of the United States

EDDIE MENDIOLA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether 8 C.F.R. 1003.2(d), which precludes the Board from granting a motion to reopen filed by an alien who has departed the United States, is valid as applied to motions seeking *sua sponte* reopening.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 11
Conclusion 25

TABLE OF AUTHORITIES

Cases:

Ablahad v. *Gonzales*, 217 Fed. Appx. 470 (6th Cir. 2007) 20
Ahmad v. *Gonzales*, 204 Fed. Appx. 98 (2d Cir. 2006) 20
Al-Mousa v. *Holder*, No. 07-61003, 2010 WL 2802454 (5th Cir. July 9, 2010) 19
Amendarez-Mendez, In re, 24 I. & N. Dec. 646 (B.I.A. 2008) 3
Belay-Gebru v. *INS*, 327 F.3d 998 (10th Cir. 2003) 17
Beltre-Veloz v. *Mukasey*, 533 F.3d 7 (1st Cir. 2000) 12
CFTC v. *Schor*, 478 U.S. 833 (1986) 14
Castillo-Perales v. *Mukasey*, 298 Fed. Appx. 366 (5th Cir. 2008) 20
Chevron, U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 9
Coyt v. *Holder*, 593 F.3d 902 (9th Cir. 2010) 21
Dada v. *Mukasey*, 128 S. Ct. 2307 (2008) 4, 22
G-D-, In re, 22 I. & N. Dec. 1132 (B.I.A. 1999) 3, 17, 23
Grewal v. *Attorney Gen. of the U.S.*, 251 Fed. Appx. 114 (3d Cir. 2006) 20
INS v. *Abudu*, 485 U.S. 94 (1988) 2
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 13

Cases—Continued: Page

INS v. *Doherty*, 502 U.S. 314 (1992) 3
Iavorski v. *United States INS*, 232 F.3d 124 (2d Cir. 2000) 12
Jalloh v. *Gonzales*, 181 Fed. Appx. 131 (2d Cir. 2006) ... 20
Jobe v. *INS*, 238 F.3d 90 (1st Cir. 2001) 12
Kucana v. *Holder*, 130 S. Ct. 827 (2010) 23
Liu v. *Gonzales*, 473 F.3d 979 (9th Cir. 2007) 7, 21
Lopez v. *Gonzales*, 549 U.S. 47 (2006) 7
Mahamat v. *Gonzales*, 430 F.3d 1281 (10th Cir. 2005) ... 12
Mansour v. *Gonzales*, 470 F.3d 1194 (6th Cir. 2006) 20
Marin-Rodriguez v. *Holder*, 612 F.3d 591 (7th Cir. 2010) 21
Marsan v. *Attorney Gen. of the U.S.*, 199 Fed. Appx. 159 (3d Cir. 2006) 20
Mendiola v. *Gonzales*, 189 Fed. Appx. 810 (10th Cir. 2006) 6
Mendiola v. *Muskasey*, 280 Fed. Appx. 719 (10th Cir. 2008) 7, 8, 9
Navarro-Miranda v. *Ashcroft*, 330 F.3d 672 (5th Cir. 2003) 20
Oladokun v. *Attorney Gen. of the U.S.*, 207 Fed. Appx. 254 (3d Cir. 2006) 20
Owalles v. *Holder*, 577 F.3d 288 (2009) 18, 19
Pena-Muriel v. *Gonzales*, 489 F.3d 438 (1st Cir. 2007) 20
Reno v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) 16

Cases—Continued: Page

Rosillo Puga v. *Holder*, 580 F.3d 1147 (10th Cir. 2009), petition for cert. pending, No. 09-1367 (filed May 7, 2010) ..... *passim*

Sankar v. *United States Att'y Gen.*, 284 Fed. Appx. 798 (11th Cir. 2008) 20

Siberio-Nunez v. *Holder*, 356 Fed. Appx. 151 (10th Cir. 2009) 18

Tahirraj Dauti v. *Attorney Gen. of the U.S.*, 284 Fed. Appx. 798 (11th Cir. 2008) 20

Tamenut v. *Mukasey*, 521 F.3d 1000 (8th Cir. 2008) 23

William v. *Gonzales*, 499 F.3d 329 (4th Cir. 2007) 17, 18

William v. *Holder*, 359 Fed. Appx. 370 (4th Cir. 2009) 24

Zhang v. *Holder*, No. 09-2628, 2010 WL 3169292 (2d Cir. Aug. 12, 2010) 19

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 701(a)(2) 23

Controlled Substances Act, 21 U.S.C. 801 *et seq.* 7

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546:

§ 304(a)(3), 110 Stat. 3009-593 5

§ 306(b), 110 Stat. 3009-612 5

Immigration Act of 1990, Pub. L. No. 101-649, § 545(d), 104 Stat. 5066 4

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 4

8 U.S.C. 1101(a)(43)(B) 7

Statutes and regulations—Continued: Page

8 U.S.C. 1103(g)(2) 15
8 U.S.C. 1105a(e) (1994) 5, 20
8 U.S.C. 1227(a)(2)(A)(ii) 6
8 U.S.C. 1227(a)(2)(A)(iii) 6
8 U.S.C. 1229a 16, 20
8 U.S.C. 1229a(e) 15
8 U.S.C. 1229a(e)(6)(A) 9
8 U.S.C. 1229a(e)(7) 5, 13, 15, 17, 24
8 U.S.C. 1229a(e)(7)(A) 2, 9, 12, 14, 19
8 U.S.C. 1229a(e)(7)(B) 2
8 U.S.C. 1229a(e)(7)(C)(i) 2, 12, 14
8 U.S.C. 1229a(e)(7)(C)(ii) 2, 12
8 U.S.C. 1252(a)(2)(B)(ii) 23
8 C.F.R.:
Section 3.2(c)(2) (1997) 4
Section 6.2 (1952) 3
Section 1003.2 21
Section 1003.2(a) 3, 12, 15
Section 1003.2(c) 2
Section 1003.2(c)(1) 2
Section 1003.2(c)(2) 2, 8, 12
Section 1003.2(c)(3)(ii) 2
Section 1003.2(d) ..... *passim*
Section 1003.23(b)(1) 2, 3, 4, 12, 15
Section 1003.23(b)(3) 2, 3
Section 1003.23(b)(4) 2

Miscellaneous: Page

Administrative Office of the U.S. Courts,
2009 Annual Report of the Director: Judicial Business of the U.S. Courts (2010) 22
6 Fed. Reg. 71-72 (1941) 3
17 Fed. Reg. 11,475 (1952) 3
61 Fed. Reg. 18,905 (1996) 4
62 Fed. Reg. 10,321 (1997) 5, 16
H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1 (1996) ... 16

In the Supreme Court of the United States

No. 09-1378

EDDIE MENDIOLA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 585 F.3d 1303. The opinions of the Board of Immigration Appeals (Pet. App. 16a-17a; Administrative Record (A.R.) 462-463; A.R. 438-439) and the immigration judge (A.R. 515-519) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2009. A petition for rehearing was denied on December 30, 2009 (Pet. App. 18a). On March 23, 2010, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including May 28, 2010. The petition was filed on May 12, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. An alien may file a motion to reopen removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B). Such a motion is to be filed with the immigration judge (IJ) or the Board of Immigration Appeals (Board), depending upon which was the last to render a decision in the matter. 8 C.F.R. 1003.2(c) (Board), .23(b)(1) (IJ). The alien must "state the new facts that will be proven at a hearing to be held if the motion is granted" and must support the motion "by affidavits or other evidentiary material." 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), .23(b)(3). Where the motion to reopen is filed with the Board, it "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1); see also 8 C.F.R. 1003.23(b)(3) (IJ).

An alien may file only one such motion to reopen, and it must be filed within 90 days of entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), .23(b)(1). Those limitations do not apply, however, if the motion to reopen adequately shows that asylum or withholding of removal is appropriate based on "changed country conditions arising in the country of nationality or the country to which removal has been ordered," since the time of the removal order. 8 U.S.C. 1229a(c)(7)(C)(ii); see 8 C.F.R. 1003.2(c)(3)(ii), .23(b)(4).

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). The IJs and the

Board have discretion in adjudicating a motion to reopen, and they may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a), .23(b)(3); see also *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

b. If an alien does not file his motion to reopen within the 90-day time period, the IJ or the Board still may reopen his case *sua sponte*. 8 C.F.R. 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."), .23(b)(1) (similar for IJ). Whether to reopen a case *sua sponte* is entrusted to the broad discretion of the Board or IJ. 8 C.F.R. 1003.2(a), .23(b)(3). The Board and the IJs "invoke [their] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

2. Longstanding regulations of the Attorney General bar aliens who have departed the United States from obtaining reopening of their immigration proceedings.

a. The Attorney General has provided for discretionary reopening of immigration proceedings by regulation since 1941. See 6 Fed. Reg. 71-72 (1941). In 1952, the Attorney General amended his regulations to bar immigration officials from granting a motion to reopen filed by an alien who has departed the United States. 17 Fed. Reg. 11,475 (1952) (8 C.F.R. 6.2 (1952)); see *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 648-649 (B.I.A. 2008). That bar has remained substantially the

same since 1952. In its current form, the regulation addressing reopening motions before the Board provides:

> A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

8 C.F.R. 1003.2(d). Another regulation, 8 C.F.R. 1003.23(b)(1), places the same restrictions on reopening before an IJ.

b. Prior to 1996, the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, did not address whether an alien could file a motion to reopen. In 1990, Congress became concerned that aliens illegally present in the United States were using motions to reopen to prolong their stay, see *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2315 (2008), and it therefore directed the Attorney General to issue regulations to limit the number of motions to reopen an alien may file and to specify the time period for the filing of such motions. Immigration Act of 1990, Pub. L. No. 101-649, § 545(d), 104 Stat. 5066.

The Attorney General promulgated the final regulations in 1996. Those regulations included time and numerical limits on motions to reopen, and also reaffirmed the longstanding bar on granting motions to reopen filed by aliens who have left the United States. 61 Fed. Reg. 18,905 (8 C.F.R. 3.2(c)(2) (1997)).

c. In 1996, Congress amended the INA to codify procedures for filing motions to reopen. Congress provided that an alien "may file one motion to reopen" and codified the time and numerical limitations contained in the regulation. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009-593 (8 U.S.C. 1229a(c)(7)). Congress also repealed a longstanding statutory provision that precluded judicial review of removal orders if the alien had departed the United States. IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)). Congress did not, however, address the departure bar that has long been contained in the regulations.

d. The Attorney General then promulgated regulations implementing IIRIRA, which retained the longstanding departure bar. 62 Fed. Reg. 10,321 (1997). The Attorney General explained that "[n]o provision of the new section [on judicial review in IIRIRA] supports reversing the long established rule that a motion to reopen or reconsider cannot be made in immigration proceedings by or on behalf of a person after that person's departure from the United States." *Ibid.* In the Attorney General's view, "the burdens associated with the adjudication of motions to reopen and reconsider on behalf of deported or departed aliens would greatly outweigh any advantages [a] system [permitting immigration officials to grant such motions] might render." *Ibid.*

3. Petitioner is a native and citizen of Peru who became a lawful permanent resident of the United States in 1989. Pet. App. 3a; A.R. 55. He has since been convicted of several crimes in the United States, including assault with a deadly weapon and misdemeanor possession of steroids in 1996; felony possession of steroids in

2000; and misprision of a felony in 2003. Pet. 7-8; A.R. 515-517, 544-545, 624.

In March 2004, the Department of Homeland Security (DHS) charged petitioner with being removable as an alien who has been convicted of two crimes of moral turpitude and as an alien convicted of an aggravated felony. A.R. 622-625; see 8 U.S.C. 1227(a)(2)(A)(ii) and (iii). After a hearing, an immigration judge determined that petitioner was removable as an aggravated felon because of his drug offenses and ordered him removed to Peru. A.R. 515-519.

4. In November 2004, the Board dismissed petitioner's appeal. A.R. 462-463. The Board rejected petitioner's argument that the IJ should have applied Ninth Circuit law about what offenses qualify as aggravated felonies, as opposed to Tenth Circuit law, explaining that an IJ "must determine removability and relief issues using only the decisions of the circuit in which he or she sits," in addition to decisions from the Supreme Court and the Board. A.R. 462. The Board then concluded that the IJ properly applied Tenth Circuit law. A.R. 463.

Petitioner filed a petition for review of the Board's decision with the court of appeals. The court of appeals dismissed the petition for review, holding that petitioner was removable as an aggravated felon. See *Mendiola* v. *Gonzales*, 189 Fed. Appx. 810, 813-815 (10th Cir. 2006).

Petitioner was removed from the United States while his petition for review was pending. Pet. 10. Petitioner illegally reentered the United States after he had been removed. *Ibid.*

5. In March 2007, eight months after the court of appeals' decision, petitioner filed a motion to reopen with the Board. A.R. 448-454. He argued (A.R. 449)

that he should no longer be considered an aggravated felon in light of *Lopez* v. *Gonzales*, 549 U.S. 47 (2006), which held that a state offense that is a felony under state law but a misdemeanor under the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, is not a "felony punishable under the [CSA]," and therefore is not an aggravated felony under the INA. 549 U.S. at 52-53; see 8 U.S.C. 1101(a)(43)(B).

The Board denied the motion. A.R. 438-439. The Board explained that the motion was not filed within 90 days of its original decision, as required by statute and regulation, and petitioner could obtain reopening only if the Board decided to reopen his case *sua sponte*. *Ibid.* The Board determined that it could not reopen petitioner's case *sua sponte*, however, because he had departed the United States, and the departure bar in 8 C.F.R. 1003.2(d) deprived the Board of authority to grant *sua sponte* reopening. A.R. 439. The Board stated, in any event, that in its view *Lopez* "does not assist" petitioner because his second drug possession conviction would qualify as a felony under federal law. A.R. 439 n.1.

Petitioner filed a petition for review of that decision. The court of appeals dismissed the petition in May 2008, agreeing that petitioner's second drug offense qualified as an aggravated felony and rejecting his argument that the denial of his motion violated due process. *Mendiola* v. *Mukasey*, 280 Fed. Appx. 719, 722 (10th Cir. 2008). The court also determined that petitioner had waived the argument (which was based on *Lin* v. *Gonzales*, 473 F.3d 979, 981-982 (9th Cir. 2007)) that the departure bar in 8 C.F.R. 1003.2(d) should be interpreted not to apply to aliens who filed motions to reopen after the conclusion

of their removal proceedings. *Mendiola*, 280 Fed. Appx. at 722.

6. In September 2008, petitioner filed a second motion to reopen with the Board. A.R. 215-246.[1] In that motion, petitioner noted that in August 2007, a California court entered an order reclassifying his second (2000) steroid possession conviction from a felony to a misdemeanor, and he argued that the offense could no longer qualify as an aggravated felony supporting removal. A.R. 230-234. He also argued, for the first time, that his prior counsel was ineffective in failing to argue that a "steroid" under California law did not qualify as an "anabolic steroid" under federal law, and that but for the ineffective assistance of his prior counsel, he would have prevailed at his removal hearing and in his first motion to reopen. A.R. 240-245. Petitioner also contended that "the ineffective assistance of his former counsel should toll the time and numerical limits for motions to reopen." A.R. 235-245.

The Board denied the motion. Pet. App. 16a-17a. The Board denied the motion because it "exceeds the numerical limitations for motions to reopen" and "has also been filed out of time." *Id.* at 16a (citing 8 C.F.R. 1003.2(c)(2)). The Board also determined that, because petitioner had been removed in March 2005, the departure bar in 8 C.F.R. 1003.2(d) precluded him from obtaining reopening, either pursuant to a timely filed motion or under the Board's *sua sponte* reopening authority. Pet. App. 16a.

---

[1] Although the motion requested reconsideration as well as reopening, the Board treated it as only a motion to reopen, Pet. App. 16a-17a; see *id.* at 4a (court of appeals), and petitioner has not challenged that treatment or preserved a separate claim for reconsideration.

7. The court of appeals dismissed petitioner's petition for review. Pet. App. 1a-15a. Petitioner contended that the departure bar in 8 C.F.R. 1003.2(d) should be interpreted not to apply to aliens who file motions to reopen after the conclusion of their removal proceedings, and also argued that his prior attorney's ineffectiveness tolled the time and numerical limitations on motions to reopen. Pet. C.A. Br. 16-33. (The court of appeals had rejected the first argument in its earlier decision, *Mendiola*, 280 Fed. Appx. at 722, and it rejected it again, Pet. App. 10a n.4.) Petitioner raised a new argument in his reply brief, contending that the departure bar regulation was invalid because it conflicted with the provisions of the INA that authorize aliens to file motions to reopen, 8 U.S.C. 1229a(c)(7)(A). Pet. C.A. Reply Br. 11-14.

Relying on its recent decision in *Rosillo-Puga* v. *Holder*, 580 F.3d 1147 (10th Cir. 2009), petition for cert. pending, No. 09-1367 (May 7, 2010), the court first rejected petitioner's challenge to the validity of the departure bar regulation. In *Rosillo-Puga*, the court applied the familiar framework set out in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), and determined that the statute is "simply silent" on whether an alien who has departed the United States may obtain reopening of his removal order. *Rosillo-Puga*, 580 F.3d at 1156. The court explained that the relevant statutory text—which provides that "[t]he alien may file one motion to reconsider a [removal] decision," 8 U.S.C. 1229a(c)(6)(A), and that "[a]n alien may file one motion to reopen proceedings under this section," 8 U.S.C. 1229a(c)(7)(A)—does not evidence any clear intent about whether Congress "meant to repeal the post-departure bars contained in the Attorney General's regulations." 580 F.3d at 1156-

1157. The court was "not persuaded * * * that, by negative inference, Congress intentionally swept away forty years of continuous practice by the Attorney General." *Id.* at 1157. Having "concluded that the statute is not clear and unambiguous," the court determined that the Attorney General's regulation represented a "permissible construction of the statute" under step two of the *Chevron* framework, because an alien's departure from the United States fundamentally changes his status under the law. *Id.* at 1157-1158 (internal quotation marks omitted).

In this case, the court of appeals recounted its analysis in *Rosillo-Puga*, noting that both that case and this one involved *sua sponte* reopening, as opposed to motions to reopen that complied with the time and numerical limits in the statute. Pet. App. 9a-11a & n.4. The court also noted petitioner's concession that "*Rosillo-Puga* divests the [Board] of its sua sponte authority * * * to reopen his proceedings." *Id.* at 12a. The court stated, however, that "as best as [it] can discern," petitioner had an additional argument, that the departure bar does not apply "to motions to reopen filed by aliens * * * where the motion alleges ineffective assistance of counsel rising to the level of a due process violation." *Ibid.* The court noted that petitioner "declined [the court's] invitation to file supplemental briefing on that question," concluded that *Rosillo-Puga* would apply to such a motion, and then determined that it need not decide whether the Board should have equitably tolled the time and numerical limitations on filing motions to reopen. *Id.* at 12a-15a.

8. Petitioner filed a petition for rehearing en banc, which the court of appeals denied, with no member of

the panel and no judge in regular active service requesting a poll. Pet. App. 18a.

9. DHS reports that petitioner was again removed from the United States in July 2010.

ARGUMENT

Petitioner renews his contention (Pet. 26-31) that the departure bar contained in 8 C.F.R. 1003.2(d) is invalid because it conflicts with the statutory provisions governing motions to reopen. Because petitioner's motion is both time-barred and number-barred, this case concerns only the Board's *sua sponte* reopening authority. The court of appeals correctly upheld the validity of the departure bar in these circumstances. Moreover, although the Fourth Circuit has reached a contrary conclusion in considering *timely* motions to reopen, there is no disagreement in the circuits regarding whether the Attorney General may validly limit the ability of immigration officials to grant requests for *sua sponte* reopening filed by aliens who have departed the United States. In any event, this case would present a poor vehicle for considering the underlying legal issues because even if the Board could consider petitioner's request for *sua sponte* reopening and denied it on the merits, the court of appeals would be unable to review that decision, because the decision whether to reopen a case *sua sponte* is committed to agency discretion by law. Further review is therefore unwarranted.

1. This case concerns only a motion to reopen that is both time-barred and number-barred. In that circumstance, the issue the Board must decide is whether to exercise its *sua sponte* discretionary authority to grant relief. As explained above (at p. 2, *supra*), a motion to reopen must be filed within 90 days of entry of the final

order of removal, 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1). There is an exception for a motion seeking asylum or withholding of removal based on changed country conditions, 8 U.S.C. 1229a(c)(7)(C)(ii), but petitioner's motion did not seek reopening on that basis, and he has never contended that that exception to the 90-day deadline applies. The motion to reopen at issue here therefore is both time-barred and number-barred: it is petitioner's second motion, and it was filed four years after his removal order was entered. Pet. App. 3a-4a; A.R. 513. In such circumstances, an alien may only request *sua sponte* reopening under 8 C.F.R. 1003.2(a).

It is undisputed that petitioner's motion does not on its face meet the statutory time and number requirements for filing a motion to reopen. Before the court of appeals, petitioner sought equitable tolling of those time and number requirements. Pet. C.A. Br. 16-22. But petitioner does not make any such argument before this Court. The doctrine of equitable tolling, if it is even available in this context, must be "sparingly invoked," *Jobe* v. *INS*, 238 F.3d 96, 100 (1st Cir. 2001) (en banc) (internal quotation marks omitted), and would require, at a minimum, that the party seeking tolling has demonstrated due diligence in discovering and seeking to cure his attorney's allegedly deficient performance, *e.g.*, *Beltre-Veloz* v. *Mukasey*, 533 F.3d 7, 11 (1st Cir. 2008); *Mahamat* v. *Gonzales*, 430 F.3d 1281, 1283 (10th Cir. 2005). Whether the alien acted diligently depends on when a reasonable person would have discovered the possibility that his attorney had been ineffective and would have taken steps to cure the deficiency. *E.g.*, *Iavorski* v. *United States INS*, 232 F.3d 124, 134 (2d Cir. 2000). Here, petitioner would have had to establish that

his attorney was ineffective in failing to pursue the argument that a substance that qualifies as a steroid under California law would not also qualify as an anabolic steroid; that the attorney's ineffectiveness prejudiced him; that he complied with the procedural requirements set out by the Board for establishing ineffective assistance of counsel; that a reasonable person would have allowed years to elapse before discovering and taking steps to cure his attorney's alleged ineffectiveness; and that he worked diligently to discover and pursue his attorney's alleged ineffectiveness during the years that elapsed between his removal order and his second motion to reopen. Petitioner would be required to overcome all of those substantial threshold hurdles to demonstrate that the statutory time and numerical limitations should be tolled in his case.

But unless and until petitioner makes such a showing—one petitioner has not attempted to make in his certiorari petition—this case only presents a question about whether the departure bar regulation is valid as applied to *sua sponte* reopening. Because petitioner did not file his motion within the time and number limits prescribed by statute, the statutory provisions allowing an alien to file one timely motion to reopen—8 U.S.C. 1229a(c)(7)—does not apply to him, and there accordingly can be no inconsistency between the departure bar regulation and those statutory provisions in this case.

2. The court of appeals' decision is correct. As the court correctly observed, whether the departure bar regulation at issue is valid depends upon application of the *Chevron* framework. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). Here, although the statute prescribes time and numerical limitations for motions to reopen, it says nothing about whether an

alien may obtain reopening after he has departed the United States, and it does not address *sua sponte* reopening at all.

The INA provides that "[a]n alien may file one motion to reopen proceedings under this section" and requires that "the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(A) and (C)(i). As the court of appeals explained in *Rosillo-Puga* v. *Holder*, 580 F.3d 1147 (10th Cir. 2009), petition for cert. pending, No. 09-1367 (May 7, 2010), these provisions do not by their terms address whether immigration officials may grant motions to reopen filed by aliens who have departed the United States. *Id.* at 1156-1157; see Pet. App. 9a. The court of appeals found that omission particularly telling, because the Attorney General's regulations have for decades specifically precluded immigration officials from granting motions to reopen filed by aliens who have left the United States. Pet. App. 5a-6a, 9a. Indeed, when Congress codified the time and numerical limitations on motions to reopen in 1996, it left the departure bar unchanged in the regulations. *Id.* at 5a-6a; see p. 5, *supra*. As the court explained, Congress's failure to take any steps to change or override the departure bar strongly suggests that it did not intend to disturb the agency's longstanding practice. See, *e.g.*, *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986). Accordingly, there is no conflict between the statutory language providing for motions to reopen and the departure bar contained in the regulations.

Even if the statutory provisions addressing motions to reopen were thought to clearly and unambiguously grant an alien who has departed the United States a right to one motion within the time limits specified,

those provision are not at issue here, because petitioner has not complied with those time and numerical limits. That is, even if petitioner is correct that the INA "guarantees aliens the right" to file a motion to open as provided in Section 1229a(c)(7), Pet. 15, the statute only gives aliens the right to file such a motion within the time and numerical limits specified in the statute. The Attorney General has, by separate language in the regulations, granted IJs and the Board the discretion to reopen cases on their own motion. See 8 C.F.R. 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."), .23(b)(1) (similar for IJ). But *sua sponte* reopening is entirely a creature of regulation; it is not mentioned in Section 1229a(c) at all. Because no statutory provision authorizes an alien to file a motion to reopen outside the time and number limits specified, application of the departure bar to preclude the Board from exercising its discretion to grant *sua sponte* reopening cannot clearly and unambiguously conflict with the statutory text.

After concluding that the INA does not speak directly to the question, the court of appeals correctly determined that the departure bar is based on a permissible reading of the statute. Pet. App. 9a; see *Rosillo-Puga*, 580 F.3d at 1157-1158. Petitioner does not challenge this aspect of the court of appeals' decision, instead making only a *Chevron* step one argument. See Pet. 26-31. In any event, as the court noted, Congress has expressly granted rulemaking authority to the Attorney General, see 8 U.S.C. 1103(g)(2), and the departure bar regulation therefore should be given "controlling weight unless [it is] arbitrary, capricious, or mani-

festly contrary to the statute." *Rosillo-Puga*, 580 F.3d at 1155 (internal quotation marks omitted).

Here, the Attorney General reasonably decided to categorically limit immigration officials from exercising their discretion to grant reopening for aliens who have departed the United States. As the court of appeals recognized, departure is a "transformative event" that fundamentally changes the alien's status under the law. *Rosillo-Puga*, 580 F.3d at 1157 (internal quotation marks omitted). The Attorney General decided that once that event occurs, "the burdens associated with the adjudication of motions to reopen and reconsider on behalf of deported or departed aliens would greatly outweigh any advantages this system might render," such as improved accuracy of results. 62 Fed. Reg. at 10,321. That decision is reasonable in light of a central focus of Congress in IIRIRA, which was to place limits on aliens' ability to reopen their cases and to expedite their removal from the United States. See, *e.g.*, H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 360 (1996). That focus is reflected in Section 1229a itself, which imposes certain limits on the alien, but does not limit the discretion of the government. Indeed, as this Court has noted, "protecting the Executive's discretion * * * can fairly be said to be the theme of [IIRIRA]." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999). The repeated and longstanding determination by Attorneys General over many years to limit the discretion of immigration officials so that they may not grant motions to reopen filed by aliens who have departed the United States is reasonable.

That is particularly true in the context of *sua sponte* reopening. IJs and the Board are never required to exercise their *sua sponte* authority, and they only do so in

extraordinary circumstances. See, *e.g.*, *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999); also p. 3, *supra*. Whether to exercise that authority is entirely entrusted to the agency's discretion, and that decision is not subject to judicial review. See pp. 23-24, *infra*. In the same way that the Attorney General decided to authorize *sua sponte* reopening—a procedural mechanism, not mentioned in the Act, available to IJs and the Board for consideration of an otherwise barred motion in exceptional circumstances—he may reasonably decide to limit that mechanism to certain cases. See, *e.g.*, *Belay-Gebru* v. *INS*, 327 F.3d 998, 1001 (10th Cir. 2003) (observing that "no statutory language authorizes the BIA to reconsider a deportation proceeding *sua sponte*" and that the regulations authorizing *sua sponte* reopening contain "no meaningful standard against which to judge the BIA's exercise of its discretion"). There is, accordingly, no basis for invalidating the longstanding departure bar regulations, particularly in the context of *sua sponte* reopening.

3. Petitioner contends (Pet. 15-17) that review is warranted because the decision below conflicts with the Fourth Circuit's decision in *William* v. *Gonzales*, 499 F.3d 329 (2007). In that case, the Fourth Circuit concluded that the statement in Section 1229a(c)(7) that an alien "may file" one motion to reopen within the specified time limits "unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country," and therefore conflicts with the departure bar regulations. *Id.* at 332.

The Fourth Circuit, however, did not address the timeliness of the alien's motion to reopen, or what would be the result if the only vehicle that would be available

to the alien was *sua sponte* reopening.[2] Here, by contrast, petitioner's motion did not comply with the time and numerical limitations in Section 1229a(c)(7), and he therefore could only obtain reopening if the Board decided to reopen his case on its own. In both this case and *Rosillo-Puga*, the court of appeals considered only *sua sponte* reopening. Pet. App. 10a & n.4. And in *Rosillo-Puga*, the court specifically "distinguishe[d] this case from * * * *William*" on the ground that *Rosillo-Puga* concerned only an untimely motion to reopen. 580 F.3d at 1158.[3]

The other courts that have considered the departure bar regulations in the particular context of *sua sponte* reopening have rejected the aliens' challenges. In *Ovalles* v. *Holder*, 577 F.3d 288 (2009), the Fifth Circuit rejected such a challenge and found it unnecessary to address the validity of the departure bar for timely motions to reopen, explaining that, "[i]n asking us to invalidate [8 C.F.R.] 1003.2(d), [the alien] invokes statutory provisions that offer him no relief" because the alien's motion to reopen was untimely. 577 F.3d at 295; see also Pet. App. 8a n.3 (discussing *Ovalles*). The court explained that "because Sections 1229a(c)(6) and 1229a(c)(7) * * * do not grant [the alien] the right to have his facially and concededly untimely motion heard by the [Board], he cannot rely on those statutory provisions as a basis for contending that the [Board] was required to give *sua sponte* consideration to the merits of

---

[2] It appears that the motion in *William* may well have been untimely, 499 F.3d at 331, but the court of appeals did not address whether the motion was timely or consider timeliness in its analysis.

[3] The other Tenth Circuit decision petitioner cites (Pet. 16), *Silerio-Nunez* v. *Holder*, 356 Fed. Appx. 151 (2009), also concerned an untimely motion to reopen. *Id.* at 152.

his * * * motion." 577 F.3d at 296. And, like the court below, the Fifth Circuit determined that the untimeliness of the alien's motion was a "key fact [that] distinguishes the present case from *William*." *Id.* at 295; see also *Al-Mousa* v. *Holder*, No. 07-61003, 2010 WL 2802454, at *1 (5th Cir. July 9, 2010) (per curiam) (declining to reach the question whether 8 C.F.R. 1003.2(d) is contrary to 8 U.S.C. 1229a(c)(7)(A) because the motion to reopen was untimely).

The Second Circuit recently reached the same conclusion in the context of *sua sponte* reopening in *Zhang* v. *Holder*, No. 09-2628, 2010 WL 3169292 (Aug. 12, 2010). The court explained that "[t]here is no dispute here that the Attorney General's decision to provide the [Board] with such authority was a valid use of his rulemaking power under the INA," and "[i]f the Attorney General possesses the authority to vest *sua sponte* jurisdiction in the [Board]—and it is undisputed here that he does—then it stands to reason that he would also have the authority to limit that jurisdiction and define its contours through, among other things, the departure bar." *Id.* at *9. The court noted that the alien "ha[d] not argued that the *sua sponte* power itself is inconsistent with the statute," but found that unsurprising, because "there was no statutory basis for his motion." *Ibid.* Thus, the courts of appeals that have considered the context here have all upheld the validity of the departure bar regulations.

Petitioner cites (Pet. 17-20) a variety of other decisions, none of which conflicts with the decision below. As petitioner himself concedes, several decisions simply assumed the validity of the departure bar, or rejected arguments about how the regulation should be interpreted, without considering any statutory argument like

the one petitioner makes here.[4] In *Pena-Muriel* v. *Gonzales*, 489 F.3d 438, 441-442 (2007), cert. denied, 129 S. Ct. 37 (2008), the First Circuit upheld the departure bar against a different challenge than the one petitioner makes here. In that case, the court rejected the argument that Congress's repeal of 8 U.S.C. 1105a(c) (1994), which precluded judicial review of removal orders for aliens who had departed the United States, abrogated the Attorney General's authority to enforce the departure bar. 489 F.3d at 441. That is different from the argument here, where petitioner contends that the departure bar regulation conflicts with various provisions in Section 1229a. And in any event, the First Circuit's conclusion is consistent with the conclusion reached by the court below.

Finally, the Ninth Circuit has interpreted the departure bar regulation so as not to apply to aliens whose removal proceedings have been completed, but that case

---

[4] See *Mansour* v. *Gonzales*, 470 F.3d 1194, 1198, 1200 (6th Cir. 2006); *Navarro-Miranda* v. *Ashcroft*, 330 F.3d 672, 675-676 (5th Cir. 2003) (*sua sponte* reopening context); see also *Tahiriraj-Dauti* v. *Attorney Gen. of the U.S.*, 323 Fed. Appx. 138, 139 (3d Cir. 2009) (unpublished, non-precedential opinion); *Castillo-Perales* v. *Mukasey*, 298 Fed. Appx. 366, 369 (5th Cir. 2008) (per curiam) (unpublished, non-precedential opinion); *Sankar* v. *United States Att'y Gen.*, 284 Fed. Appx. 798, 799 (11th Cir. 2008) (per curiam) (unpublished opinion); *Ablahad* v. *Gonzales*, 217 Fed. Appx. 470, 475 n.6 (6th Cir. 2007) (unpublished, non-precedential opinion); *Grewal* v. *Attorney Gen. of the U.S.*, 251 Fed. Appx. 114, 115-116 (3d Cir. 2006) (unpublished, non-precedential opinion); *Oladokun* v. *Attorney Gen. of the U.S.*, 207 Fed. Appx. 254, 256-257 (3d Cir. 2006) (unpublished, non-precedential opinion); *Ahmad* v. *Gonzales*, 204 Fed. Appx. 98, 99 (2d Cir. 2006) (per curiam) (unpublished opinion); *Marsan* v. *Attorney Gen. of the U.S.*, 199 Fed. Appx. 159, 165 (3d Cir. 2006) (per curiam) (unpublished opinion); *Jalloh* v. *Gonzales*, 181 Fed. Appx. 131, 132 (2d Cir. 2006) (per curiam) (unpublished opinion).

did not address whether the regulation is consistent with the INA. See *Lin* v. *Gonzales*, 473 F.3d 979, 981-982 (2007).[5] The Ninth Circuit also has held that 8 C.F.R. 1003.2(d) does not apply to "withdrawal of a[] [motion to reopen] filed by a petitioner who has been involuntarily removed from the United States." *Coyt* v. *Holder*, 593 F.3d 902, 907 (2010). But that decision specifically addressed the portion of the departure bar regulation stating that an alien's departure from the United States "shall constitute a withdrawal" of a motion to reopen that has already been filed, 8 C.F.R. 1003.2(d), which was not the basis for the decision below, and it considered a different argument than petitioner makes here.[6]

To be sure, although this case concerns only a motion seeking *sua sponte* reopening, the court below did state its view that the regulation would be valid even in the context of a timely motion to reopen. But even so, any disagreement in the circuits on the broader question whether the departure bar regulations are valid for timely motions to reopen is limited to the Fourth and Tenth Circuits. See Pet. 15-17 (acknowledging that only two circuits have addressed that question). To the ex-

---

[5] As noted above (at pp. 7-9, *supra*), petitioner made an argument based on *Lin* before the court of appeals, both in his petition for review of his first motion to reopen and petition for review of his second motion to reopen. The court of appeals rejected it both times. Petitioner does not seek certiorari on that basis.

[6] In *Marin-Rodriguez* v. *Holder*, 612 F.3d 591, 593-595 (2010), the Seventh Circuit recently determined that the departure bar in 8 C.F.R. 1003.2 should not be interpreted to limit the Board's jurisdiction to consider such motions, but instead to bar the Board from granting such motions. But the court did not cast doubt on the validity of the departure bar itself.

tent that issue may warrant this Court's review, the Court should wait for additional courts of appeals to address it, particularly because the Fourth and Tenth Circuits comprise less than five percent of the total immigration caseload in the courts of appeals. See Administrative Office of the U.S. Courts, *2009 Annual Report of the Director: Judicial Business of the United States Courts* 94-98 (2010) (Table B-3).

Contrary to petitioner's suggestion (Pet. 25-26), there is no disagreement in the courts of appeals about how this Court's recent decision in *Dada* v. *Mukasey*, 128 S. Ct. 2307 (2008), affects the departure bar. As petitioner himself notes (Pet. 25), the *William* court did not consider *Dada* because the decision in *William* predated *Dada*. Moreover, as the *Rosillo-Puga* court noted, "neither party in *Dada* specifically challenged the validity of the regulations," and the Court did not consider their validity. 580 F.3d at 1153 n.3; see *Dada*, 128 S. Ct. at 2320. To the extent that *Dada* is read to indicate that the INA gives an alien an affirmative right to file a motion to reopen, 128 S. Ct. at 2319, that would apply only to motions to reopen that complied with the time and numerical limitations in the statute, not ones that are time-barred and number-barred like the motion here. Finally, the fact that the other courts of appeals (including the Fourth Circuit) have not yet considered the impact of *Dada* on the departure bar provides another reason why certiorari is premature at this time.

4. This case would be a poor vehicle for considering the interplay between the departure bar regulations and the provisions of the INA addressing motions to reopen, because this case involves only *sua sponte* reopening, where the ultimate decision whether to grant relief is

entrusted to the broad discretion of immigration officials and is not judicially reviewable.

Whether to reopen a case outside the time and number limits prescribed by statute is entrusted to the broad discretion of the IJ and the Board. Both exercise that discretion sparingly, reserving it for truly exceptional situations. *In re G-D-*, 22 I. & N. Dec. at 1133-1134. Moreover, all courts of appeals to consider the issue have agreed that once the IJ or Board has decided whether to exercise its *sua sponte* authority, that decision is not reviewable by the federal courts. See *Tamenut* v. *Mukasey*, 521 F.3d 1000, 1004 (8th Cir. 2008) (en banc) (per curiam) (agreeing with ten other courts of appeals).[7]

Under the Administrative Procedure Act, judicial review is not available when "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). That is true with respect to *sua sponte* reopening; the decision whether to reopen a case is entirely discretionary and there is "no meaningful standard against which to judge the agency's exercise of discretion." *Tamenut*, 521 F.3d at 1003. Further, unlike the statutory and regulatory provisions allowing an alien to file a motion to reopen, the regulations permitting an IJ or the Board to reopen a case *sua sponte* establish a procedural mechanism for immigration officials in aid of their own internal administration of immigration proceedings, and do not confer any privately enforceable rights on an alien.

---

[7] In *Kucana* v. *Holder*, 130 S. Ct. 827 (2010), which held that 8 U.S.C. 1252(a)(2)(B)(ii) generally does not preclude judicial review of the denial of a motion to reopen, the Court recognized that the courts of appeals have agreed that denials of *sua sponte* reopening are unreviewable because *sua sponte* reopening is committed to agency discretion by law. 130 S. Ct. at 839 n.18.

Thus, even if the Board could consider petitioner's motion on its merits, the Board's decision whether to exercise its *sua sponte* authority would be unreviewable.[8] Accordingly, if the Court wishes to consider whether the departure bar regulations are consistent with the provisions of the INA addressing motions to reopen, it should do so in a case where the motion was filed within the time and numerical limits provided.

Several additional features of this case make it a particularly poor vehicle for considering the legal question whether the departure bar regulations conflict with 8 U.S.C. 1229a(c)(7)'s provision that an alien may file one motion to reopen within the time and numerical limits specified. Unlike *Rosillo-Puga*, this case involves not only an untimely motion, but one that is number-barred as well. Pet. App. 16a. Although petitioner suggested below that equitable tolling should apply, that argument was not well-developed: the court of appeals stated that it had trouble "discern[ing]" petitioner's argument, and that when the court invited supplemental briefing on the issue, petitioner "declined [the court's] invitation." *Id.* at 12a-13a. Petitioner did not renew the equitable tolling argument here. But if the Court were to consider it, the Court would be required to make difficult threshold determinations about the availability of equitable tolling generally and its application in this case before even reaching the question petitioner attempts to present. The Court therefore should await a better case for ad-

---

[8] Indeed, on remand in *William*, the Board denied the alien's motion on the ground that it was untimely and declined to exercise its *sua sponte* authority. See *William* v. *Holder*, 359 Fed. Appx. 370, 372-373 (4th Cir. 2009). The court of appeals then dismissed the petition for review, stating that it lacked jurisdiction to review the Board's decision not to exercise its *sua sponte* reopening authority. *Id.* at 373.

dressing the question presented. Moreover, petitioner's statutory argument was hardly well-developed in the court of appeals: although the argument petitioner now makes has been available to him since his first motion to reopen in March 2007, he did not make the argument until his reply brief in the court of appeals in this case, and then spent only a few pages developing the argument. See Pet. C.A. Reply 11-14. For that reason, the government argued below that res judicata barred the court's consideration of the issue. Gov't C.A. Br. 17-19. Although the court of appeals did not reach that argument, it may well serve as another basis for affirmance of the decision below, regardless of how this Court would resolve the question presented. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

TONY WEST
Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

SEPTEMBER 2010

172

(3)

Supreme Court, U.S.
FILED
OCT 13 2010
OFFICE OF THE CLERK

No. 09-1378

In the Supreme Court of the United States

EDDIE MENDIOLA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

DAN M. KAHAN
Yale Law School Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

KARI E. HONG
Law Offices of Kari E. Hong
1300 Clay, Ste. 600
Oakland, CA 94612
(510) 384-4524

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. This Case Presents The Question Whether The Regulatory Departure Bar Is Invalid. 1

B. The Courts Of Appeals Are Divided Over The Validity Of The Departure Bar Regulations. 5

C. This Case Provides A Suitable Vehicle For Resolution Of The Conflict. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Al-Mousa v. *Holder*,
No. 07-61003, 2010 WL 2802454
(5th Cir. July 9, 2010) 8

Cooper Indus. v. *Aviall Servs., Inc.*,
543 U.S. 157 (2004) 4

Coyt v. *Holder*,
593 F.3d 902 (9th Cir. 2010) 5

Dada v. *Mukasey*,
128 S. Ct. 2307 (2008) 8

Fitzgerald v. *Barnstable Sch. Comm.*,
129 S. Ct. 788 (2009) 4

Galvez Piñeda v. *Gonzales*,
427 F.3d 833 (10th Cir. 2005) 4

Lopez v. *Mukasey*,
313 Fed. App'x 96 (10th Cir. 2008) 5

Marin-Rodriguez v. *Holder*,
612 F.3d 591 (7th Cir. 2010) 5, 6, 7

Ovalles v. *Holder*,
577 F.3d 288 (5th Cir. 2009) 8

Riley v. *INS*,
310 F.3d 1253 (10th Cir. 2002) 4

Rosillo-Puga v. *Holder*,
580 F.3d 1147 (10th Cir. 2009) ..... *passim*

United States v. *Aguirre-Tello*,
353 F.3d 1199 (10th Cir. 2004) 5

United States v. *Wells*,
519 U.S. 482, 488 (1997) 9

William v. *Gonzales*,
499 F.3d 329 (4th Cir. 2007) 3

Zhang v. *Holder*,
No. 09-2628, 2010 WL 3169292
(2d Cir. Aug. 12, 2010) 8

STATUTE

8 U.S.C. § 1229a(c)(7)(A) 8

REPLY BRIEF FOR PETITIONER

The government's brief has the character of a voyage through the looking glass: it opposes review of an issue that was not decided below and is not presented in the petition. The government addresses, almost exclusively, the BIA's authority to reopen proceedings *sua sponte*. But the agency's *sua sponte* authority is *not* the subject of the petition; the question presented, instead, is whether an alien's departure from the United States vitiates his or her *statutory entitlement* to file a motion to reopen or reconsider an order of removal. The Tenth Circuit decided below that departure has that effect, and that statutory holding is the one challenged in the petition.

It is not hard to see why the government would rather avoid *that* question. The issue presented here has divided the courts of appeals, as the government concedes; it is the source of pervasive and growing confusion; and it is a matter of enormous practical importance, as the government notably does not deny. It also is a question, the government's understandable obscurantism notwithstanding, that is squarely and cleanly presented in this case. Further review accordingly is warranted.

A. This Case Presents The Question Whether The Regulatory Departure Bar Is Invalid.

The government recognizes the conflict in the circuits on the question addressed in the petition: whether BIA's departure bar regulations are invalid under IIRIRA. Its principal argument against review accordingly is that this question is not presented in this case. The government maintains that, "[b]ecause petitioner's motion is both time-barred and number-

barred, this case concerns only the Board's *sua sponte* reopening authority," and that "[i]n both this case and *Rosillo-Puga* [v. *Holder*, 580 F.3d 1147 (10th Cir. 2009)], the court of appeals considered only *sua sponte* reopening." Opp. 11, 18. A holding directed only to the scope of BIA's *sua sponte* authority, the government concludes, does not merit the Court's attention.

That description of the holding below, however, is manifestly wrong, and would rewrite the Tenth Circuit's ruling in a remarkable way. In fact, the court of appeals decided, expressly and unambiguously, that "*[the] post-departure bar divests [the BIA] of jurisdiction to review a motion to reopen filed by a removed alien*, like Petitioner, even though relevant regulations allow an alien to file one motion to reopen within 90 days." Pet. App. 14a (emphasis added). See *id.* at 13a (*Rosillo-Puga* held "that Congress's provision for one motion to reopen within 90 days of removal * * * does not alter the valid continued operation of the regulatory post-departure bar to motions to reopen"). This is, in so many words, a holding that the departure bar trumps the entitlement to file a motion to reopen or reconsider in *all* circumstances.

There is no room for doubt on this point. The Tenth Circuit did not treat this case, as the government would have it, as one that "concerns only the Board's *sua sponte* reopening authority" and that involves "only a motion to reopen that is both time-barred and number-barred." Opp. 11. Indeed, the court of appeals *could not* have regarded the case that way. Arguing below, petitioner conceded that, under circuit precedent, the departure bar *denied* the Board *sua sponte* authority to grant post-departure

relief. See Pet. App. 12a. Instead, petitioner took the position that he was simply not subject to the time and numerosity limits on motions to reopen because those limits were equitably tolled in his case by the ineffective assistance of his prior counsel; he therefore invoked the statutory entitlement to file a post-departure motion that was recognized by the Fourth Circuit in *William* v. *Gonzales*, 499 F.3d 329 (4th Cir. 2007). See Pet. App. 12a, 15a.

The Tenth Circuit rejected that argument on the merits, disagreed with *William* (on the Tenth Circuit precedent of *Rosillo-Puga*), and concluded that under BIA's regulations the agency lacks all authority to consider the motions to reopen "of deported or departed aliens." For that reason, the court below did "not reach the issue of whether BIA should have equitably tolled the time and numerical limits on filing motions to reopen." *Id.* at 15a. Because the question posed to and decided by the court thus was whether a departed alien who *satisfies* the time and numerosity bars (through equitable tolling or otherwise) has an entitlement to file a motion to reopen or reconsider, the court in its holding below said not a word about the BIA's *sua sponte* authority.

Deconstructing the government's brief suggests that, despite itself, it cannot help but recognize these points. The government acknowledges that petitioner pressed an equitable tolling argument below, but complains that "petitioner does not make any such [equitable tolling] argument before this Court"; the government argues that "unless and until petitioner makes such a showing [of entitlement to equitable tolling]—one petitioner has not attempted to make in his certiorari petition—this case presents only a question about whether the departure bar regulation

is valid as applied to *sua sponte* reopening." Opp. 12, 13. But with respect, this argument is silly. *Of course* we do not present an equitable tolling claim to this Court: the equitable tolling issue was not decided below because the Tenth Circuit held, as a threshold matter, that the departure bar made satisfaction of the statutory and regulatory time and numerosity requirements (again, through equitable tolling or otherwise) immaterial. In such circumstances, the ordinary procedural course is for the Court to resolve the question presented in the petition and, if petitioner prevails, to remand for "full consideration by the courts below" of petitioner's entitlement to equitable tolling. *Cooper Indus.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 169 (2004); see, *e.g.*, *Fitzgerald* v. *Barnstable Sch. Comm.*, 129 S. Ct. 788, 797-798 (2009). That is the proper outcome here.[1]

---

[1] Although that should be enough to show that the question presented in the petition was decided below and is properly before the Court now, it may be added that there is every reason to expect that petitioner's equitable tolling claim would prevail on remand. The government backhandedly acknowledges that equitable tolling of the time and numerosity limits is available (Opp. 12-13), a point it could hardly deny. See *Riley* v. *INS*, 310 F.3d 1253, 1257-1258 (10th Cir. 2002); see also *Galvez Piñeda* v. *Gonzales*, 427 F.3d 833 (10th Cir. 2005) (tolling filing deadline until three months after aliens learned or should have learned of prior counsel's ineffectiveness). The government does not dispute that petitioner properly raised his equitable tolling argument before both the Board and the court of appeals, which acknowledged the argument but considered themselves unable to consider its merits due to the departure bar. He pursued the claim diligently, demonstrating his original lawyer's incompetence, promptly retaining new counsel when he learned of that incompetence, and filing his current motion to reopen within two months of obtaining the administrative record. Pet. 12-13 & n.10. And the prejudicial effect of original counsel's deficient

B. The Courts Of Appeals Are Divided Over The Validity Of The Departure Bar Regulations.

Once past its effort to recharacterize the holding below, the government has very little to say in opposition to the petition. Although the government's discussion of the point is a bit confused, it ultimately recognizes the conflict between the Fourth and Tenth Circuits on the validity of the departure bar. Opp. 21; see *id.* at 17-22. This point, too, is not debatable; the conflict has been acknowledged repeatedly by the Tenth Circuit (see Pet. 16; Pet. App. 9a), and has been noted by the Seventh and Ninth Circuits. See *Marin-Rodriguez* v. *Holder*, 612 F.3d 591, 592 (7th Cir. 2010); *Coyt* v. *Holder*, 593 F.3d 902, 907 n.3 (9th Cir. 2010) ("Those circuits are split.").[2] There is no

---

performance is manifest: among other things, counsel failed to raise a full and obvious defense to removability at petitioner's removal hearing. Pet. 8-10. The government thus does not deny that, absent the attorney's mistakes, there is much more than a "reasonable likelihood" that petitioner would have prevailed at his removal hearing and on a subsequent motion to reopen. *Lopez* v. *Mukasey*, 313 Fed. App'x 96, 100 (10th Cir. 2008) (citing *United States* v. *Aguirre-Tello*, 353 F.3d 1199, 1209 (10th Cir. 2004)); see Pet. 7-12.

[2] Although ultimately acknowledging that "the court below did state its view that the regulation would be valid even in the context of a timely motion to reopen" (Opp. 21), the government tries to minimize the conflict between the Tenth and Fourth Circuits by asserting that "[i]n both this case and *Rosillo-Puga*, the [Tenth Circuit] considered only *sua sponte* reopening." Opp. 18. But that is wrong. As we explain in text, the Tenth Circuit's decision in this case assumed satisfaction of the time and numerosity requirements and proceeded to approve application of the departure bar. And although that is enough to establish that the Tenth and Fourth Circuits disagree on the validity of the departure bar as it applies to motions that satisfy the time and numerosity requirements, in *Rosillo-Puga* itself the court

reason to delay review, as the government urges (at Opp. 21-22). The issue has been thoroughly addressed by majority and dissenting opinions in both the Fourth and the Tenth Circuits. See Pet. 15-17. Other courts have added their two cents. See, *e.g.*, *Marin-Rodriguez*, 612 F.3d at 592-593. There is no prospect that the conflict will resolve itself absent this Court's intervention. And because the source of the conflict is disagreement about the meaning of a statute, the problem cannot be cured by agency action. The government does not contend otherwise, or suggest any benefit that would follow from postponing resolution of the question presented here.

To the contrary, there is a compelling reason for the Court to address the issue now: the confusion in the lower courts regarding the application of the departure bar is pervasive and growing. Since the filing of the petition in this case, the Seventh Circuit, in an opinion by Chief Judge Easterbrook, struck down the departure bar regulation governing motions to reopen as "untenable," coming out "in favor of the rul-

---

addressed the validity of the departure bar as a threshold matter *before* considering these requirements. Although the court did ultimately observe that the motion in *Rosillo-Puga* was time-barred, as the government notes here (at Opp. 18), it did so as a secondary, alternative ruling (see 580 F.3d at 1158); the Tenth Circuit's principal holding was that the departure bar is valid and governs in *all* cases. *Id.* at 1152-1158. Indeed, although Judge O'Brien would have preferred to decide *Rosillo-Puga* on the ground (advanced by the government here) that Rosillo-Puga's motion was time-barred, he joined the lead opinion specifically to provide a majority for the Tenth Circuit's decision upholding the departure bar. See *id.* at 1160-1161 (O'Brien, J., concurring); see also Pet. App. 11a n.5 (Judge O'Brien provided majority in *Rosillo-Puga* to decide "whether the regulatory post-departure bar contravenes the statutory provisions").

ing in *William*." *Marin-Rodriguez*, 612 F.3d at 593-594. The Seventh Circuit did so, however, "on a rationale distinct from the [F]ourth [C]ircuit's": noting that the BIA believes that it lacks jurisdiction to entertain the claims of aliens who have departed the country, the Seventh Circuit reasoned that "since 1996 nothing in the statute undergirds a conclusion that the Board lacks 'jurisdiction' * * * to issue decisions that affect the legal rights of departed aliens," and that "an administrative agency is not entitled to contract its own jurisdiction." *Id.* at 594.[3]

As a consequence, the lower courts have now adopted a range of inconsistent approaches.[4] The

---

[3] The government's description of *Marin-Rodriguez* as deciding only that the departure bar regulation "should not be interpreted to limit the Board's jurisdiction to consider such motions [to reopen], but instead to bar the Board from granting such motions" (Opp. 21 n.6) is, to put it charitably, a stretch. In fact, the Seventh Circuit noted that the BIA regarded the departure bar not as "a categorical exercise of discretion" but as a rule that "curtails its jurisdiction," and held that such a jurisdictional rule is unenforceable. 612 F.3d at 593, 595. Although the court added that the BIA may be entitled to recast its rule "as one resting on a categorical exercise of discretion" (*id.* at 595), unless and until it does so, and unless such a rule is upheld, the departure bar is void in the Seventh Circuit. See *id.* There is no reason to believe the Board will make an attempt to recast the rule any time soon: "the Department of Justice has not changed the view, expressed in its brief, that the Board is *right* in believing that it lacks jurisdiction." *Id.* at 596.

[4] Although the government argues that "[t]he other courts that have considered the departure bar regulations in the particular context of *sua sponte* reopening have rejected the aliens' challenges" (Opp. 18), the comparison to petitioner's case is wholly inapt. The decisions discussed by the government are ones in which the time and numerosity restrictions denied the alien entitlement to relief (*id.* at 18-19) and the aliens did *not* advance

Tenth Circuit and several other courts of appeals have upheld the departure bar. See Pet. 17-19. The Fourth Circuit has held the departure bar invalid as inconsistent with 8 U.S.C. § 1229a(c)(7)(A). The Seventh Circuit has held the bar unenforceable as an improper attempt by the agency to limit its jurisdiction. And as we showed in the petition (at 20; see also Opp. 20-21), the Ninth Circuit has held that the departure bar is simply not applicable to aliens whose removal proceedings have been completed. The result is that identically situated aliens are treated differently in different parts of the country. Because the availability of motions to reopen and reconsider is a matter of enormous practical importance—as this Court recognized in *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2318 (2008), and as the government very notably does not deny—such inconsistency is intolerable.

C. This Case Provides A Suitable Vehicle For Resolution Of The Conflict.

Finally, the government's formulaic recital of no fewer than five reasons why this case provides a poor vehicle with which to resolve the conflict is wholly insubstantial: quantity is no substitute for quality.

First, and principally, the government maintains that review is inappropriate because this case "involves only *sua sponte* reopening," a sort of determination that (the government says) is not judicially reviewable. Opp. 22-24. But this is, of course, simply

---

arguments for equitable tolling, as petitioner does here. See *Zhang* v. *Holder*, No. 09-2628, 2010 WL 3169292, at *7 (2d Cir. Aug. 12, 2010); *Al-Mousa* v. *Holder*, No. 07-61003, 2010 WL 2802454 (5th Cir. July 9, 2010); *Ovalles* v. *Holder*, 577 F.3d 288, 298 n.7 (5th Cir. 2009).

a reprise of the government's original mischaracterization of the holding below, and adds nothing to its argument.

Second, the government says that "[u]nlike *Rosillo-Puga*, this case involves not only an untimely motion, but one that is number-barred as well." Opp. 24. But that assertion is immaterial for present purposes because petitioner's position is that *both* bars are equitably tolled—and the Tenth Circuit declined to resolve the tolling point because it held that the departure bar applies in *all* cases.[5]

Third, the government states that petitioner's equitable tolling argument is "not well-developed," that he "did not renew the equitable tolling argument here," and that if the Court were to consider the equitable tolling claim it "would be required to make difficult threshold determinations." Opp. 24. It is undisputed, however, that the equitable tolling claim was presented to both the BIA and to the court of appeals. See note 1, *supra*. And as we have explained, that claim is *not* presented on the merits for determination by this Court; as noted above, we would expect the issue to be decided by the Tenth Circuit on remand if this Court grants the petition and reverses on the validity of the departure bar.

Fourth, the government declares that petitioner's statutory argument "was hardly well-developed in the court of appeals." Opp. 25. But that assertion is beside the point; the issue was *decided* by the Tenth Circuit and therefore is properly before this Court. See *United States* v. *Wells*, 519 U.S. 482, 488 (1997)

---

[5] In contrast to petitioner, Rosillo-Puga did not advance an equitable tolling claim below. See *Rosillo-Puga*, 580 F.3d at 1161.

(Court may decide any question presented in a petition that was passed on by the court of appeals).

Fifth, the government suggests that res judicata might provide an alternative basis for affirmance of the decision below. Opp. 25. But the government recognizes that "the court of appeals did not reach that argument" (*ibid.*), and the government's contention, if it has any plausibility, may be presented to the Tenth Circuit on remand. Accordingly, because each of these makeweight arguments lacks merit, and because this Court's intervention is necessary to resolve a conflict on a recurring and very important question, review of this case is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAN M. KAHAN
Yale Law School Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

KARI E. HONG
Law Offices of Kari E. Hong
1300 Clay, Ste. 600
Oakland, CA 94612
(510) 384-4524

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

OCTOBER 2010